DOCKET

(9)

No. 83-1673-CFX
Status: GRANTED

Title: Donald J. Devine, Director, Office of Personnel Management, Petitioner
v.
Allison E. Nutt, et al.

Docketed:
April 13, 1984

Court: United States Court of Appeals for the Federal Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Hobbie, Charles A.

Entry	Date	Note	Proceedings and Orders
1	Feb 3 1984		Application for extension of time to file petition anc order granting same until April 16, 1984 (Chief Justic February 10, 1984).
2	Apr 13 1984	G	Petition for writ of certiorari filed.
3	May 22 1984		DISTRIBUTED. June 7, 1984
5	May 25 1984		Order extending time to file response to petition unti June 15, 1984.
6	Jun 15 1984		Brief of respondents Allison E. Nutt, et al. in oppositior filed.
7	Jun 15 1984		Brief amicus curiae of Natl. Treasury Employees Unior file
8	Jun 20 1984		REDISTRIBUTED. September 24, 1984
9	Aug 28 1984	X	Reply brief of petitioner Devine, Dir., OPM filed.
10	Oct 1 1984		Petition GRANTED.
11	Nov 15 1984		Brief of petitioner Devine, Dir., OPM filed.
12	Nov 20 1984	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
13	Dec 4 1984		SET FOR ARGUMENT. Monday, January 7, 1985. (4th case).
14	Dec 10 1984		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
15	Dec 6 1984		CIRCULATED.
16	Dec 11 1984		Record filed.
17	Dec 19 1984	X	Brief amicus curiae of Natl. Treasury Employees Union, et al. filed.
18	Dec 19 1984	X	Brief of respondents Allison E. Nutt, et al. filed.
19	Dec 19 1984	G	Motion of the Solicitor General to permit Charles A. Rothfeld, Esquire, to present oral argument pro hac vi filed.
20	Dec 28 1984	X	Reply brief of petitioner Devine, Dir., OPM filed.
21	Jan 7 1985		Motion of the Solicitor General to permit Charles A. Rothfeld, Esquire, to present oral argument pro hac vi GRANTED.
22	Jan 7 1985		ARGUED.

BEST AVAILABLE COPY

14

PETITION FOR WRIT OF CERTIORARI

(1)

No. 83-1673

FILED
APR 13 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

ALLISON E. NUTT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
BARBARA E. ETKIND
Assistant to the Solicitor General
DAVID M. COHEN
GEORGE M. BEASLEY, III
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

70 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Under 5 U.S.C. 7701(c)(2)(A), a federal employee who appeals to the Merit Systems Protection Board from adverse agency action is entitled to have the agency action set aside or mitigated on account of procedural error committed by the agency only if he can show that the error caused substantial harm or prejudice to his rights. The question presented by this case is whether the statute requires a different standard of review to be applied when a federal employee who is a member of a bargaining unit seeks review of adverse agency action by an arbitrator.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the General Services Administration and the American Federation of Government Employees, AFL-CIO, Local 3275, were respondents in the court of appeals. Thomas Rogers and Robert Wilson, Jr., were the grievants in the arbitration proceedings.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory and regulatory provisions involved	2
Statement	3
Reasons for granting the petition	9
Conclusion	20
Appendix A	1a
Appendix B	17a
Appendix C	21a
Appendix D	40a
Appendix E	42a
Appendix F	43a

TABLE OF AUTHORITIES

Cases:

Battaglia v. *Department of Health and Human Services*, 5 M.S.P.B. 212	11
Brewer v. *United States Postal Service*, 647 F.2d 1093, cert. denied, 454 U.S. 1144	15
Brown v. *GSA*, 425 U.S. 820	17
Cheney v. *Department of Justice*, 720 F.2d 1280	15
Davies v. *Department of the Navy*, 4 M.S.P.B. 83	10
Devine v. *Sutermeister*, 724 F.2d 1558	19
Devine v. *White*, 697 F.2d 421	15

Cases—Continued: Page

Food Safety and Quality Service, 7 F.L.R.A., 665 17

Fuiava v. *Department of Justice*, 3 M.S.P.B. 217 ..... 10, 11

Giesler v. *Department of Transportation*, 3 M.S.P.B. 367, aff'd, 686 F.2d 844 11

Iowa National Guard and National Guard Bureau, 8 F.L.R.A. 500 17

Miguel v. *Dep't of the Army*, No. 83-878 (Fed. Cir. Feb. 7, 1984) 15

Parker v. *Defense Logistics Agency*, 1 M.S.P.B. 489 ..... 10, 11, 12

Shaw v. *United States Postal Service*, 697 F.2d 1078 15

Stalkfleet v. *United States Postal Service*, 6 M.S.P.B. 536 11

United States v. *Hasting*, No. 81-1463 (May 23, 1983) 12

Statutes and regulations:

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 5
5 U.S.C. 4303(e) 5
5 U.S.C. 7103(a)(9)(C)(i) 16
5 U.S.C. 7114(a)(2)(B) 6
5 U.S.C. 7121(b)(3)(A) 16

Statutes and regulations—Continued: Page

5 U.S.C. 7121(e)(1) 5
5 U.S.C. 7121(e)(2) 2, 12, 14
5 U.S.C. 7121(f) 7, 14
5 U.S.C. 7513(d) 5
5 U.S.C. 7701 5
5 U.S.C. 7701(c) 2
5 U.S.C. 7701(c)(1) 14
5 U.S.C. 7701(c)(2) 12
5 U.S.C. 7701(c)(2)(A) 8, 10
5 U.S.C. 7701(j) 10
5 U.S.C. 7703(d) 7, 8, 19

Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 7
28 U.S.C. 46(b) 8
28 U.S.C. 1295(a)(9) 7
31 U.S.C. 1349(b) 8

5 C.F.R.:

Section 1201.56(b)(1) 12
Section 1201.56(c)(3) 2, 10, 12

Miscellaneous:

F. Elkouri & E. Elkouri, *How Arbitration Works* (3d ed. 1973) 16

H.R. Rep. 95-1717, 95th Cong., 2d Sess. (1978) 8, 12, 14

Statutes and regulations—Continued: Page

Office of Policy and Communications, OPM, *Union Recognition in the Federal Government* (1983) 18

OPM, *Federal Personnel Manual Bulletin No. 711-89*, Attach. 2 (Dec. 1, 1983) 18

S. Rep. 95-969, 95th Cong., 2d Sess. (1978) 11, 13, 14

H.R. Rep. 97-312, 97th Cong., 1st Sess. (1981) 18

S. Rep. 97-275, 97th Cong., 1st Sess. (1981) 17

In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

ALLISON E. NUTT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of Donald J. Devine, Director of the Office of Personnel Management, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 718 F.2d 1048. The order of the court of appeals denying respondents' motion to dismiss (App., *infra*, 17a-20a) is not reported. The arbitration decision and award of respondent Nutt and his revised award (App., *infra*, 21a-41a) also are not reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 42a) was entered on September 22, 1983. A petition for

rehearing was denied on November 18, 1983 (App., *infra*, 43a). On February 10, 1984, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

5 U.S.C. 7701(c) provides in pertinent part:

> (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—
>
> (A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.
>
> (2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—
>
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision * * *.

5 U.S.C. 7121(e)(2) provides:

> In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

5 C.F.R. 1201.56(c)(3) defines "harmful error" as:

> Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

STATEMENT

1. As the court of appeals observed (App., *infra*, 2a), the facts of this case "do not provide an example of model conduct by government employees." During January 1982, Thomas Rogers and Robert Wilson, Jr. (the grievants) were employed by the General Services Administration (GSA or the Agency) as Federal Protective Service (FPS) officers at the Denver Federal Center, Denver, Colorado (*id.* at 2a, 23a). On January 7, 1982, Rogers, while on patrol in an official government vehicle, drove to his home in a nearby suburb and picked up several cans of beer at his supervisor's request.[1] Rogers then returned to the FPS command center and delivered the beer to his supervisor. The supervisor drank the beer and left the empty cans at the command post when he went off duty. *Id.* at 2a-3a, 23a-25a.

The following day, the supervisor, while off duty, became concerned that the presence of the empty beer cans would lead to the discovery of his drinking at the command post. He telephoned Wilson, who was then on duty at the command post, and instructed him to alter the monitor tapes of the previous day's telephone conversations between the command post and patrolling FPS officers to include a spurious explanation for the presence of the beer cans at the command post. Wilson

---

[1] The supervisor was discharged by GSA and the discharge was upheld by the Merit Systems Protection Board.

complied with the supervisor's request. App., *infra*, 3a, 25a.

On January 25, 1982, an FPS official who was monitoring the tapes for unrelated reasons discovered irregularities in them that led her to believe that Wilson and the supervisor had edited the tapes in an attempt to conceal the consumption of beer at the command post. As a result, special agents of GSA's Office of the Inspector General commenced an investigation of the incident. Two agents went to Rogers' home and requested him to accompany them to the local police station for a "non-custodial" interrogation. The agents subsequently interviewed Wilson in a similar fashion. Neither Rogers nor Wilson was advised that he was entitled to have a union representative present during the interview. App., *infra*, 3a-4a, 25a-27a.[2]

Approximately one month after these interviews, the agents met with each of the grievants and asked them to sign affidavits prepared from the notes taken by the agents during the previous meetings. After making substantial changes in the affidavits, both grievants signed them. App., *infra*, 4a, 28a, 35a.

On April 2, 1982, GSA formally notified the grievants that it proposed to remove them from their positions

[2] Article XXVII, Section 2, of the collective bargaining agreement between GSA and the grievants' union provides (App., *infra*, 3a n.2):

> The Employer agrees that during formal discussion where interrogation or written or sworn statements are taken from an employee, in connection with a charge that may result in disciplinary action against him, he will have the opportunity to have a representative present. It should be understood that counseling sessions are not formal discussions.

with the Federal Protective Service. After receiving the grievants' written responses to the charges, the Agency issued a removal notice to Wilson for falsification of tape recordings and attempting to conceal activities of record. Rogers likewise received a removal notice for falsification of records, failure to report irregularities and use of a government vehicle for non-official purposes. App., *infra*, 4a, 28-29a.

2. Under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, any federal employee who is subject to "adverse agency action"—removal, suspension for more than 14 days, reduction in grade, reduction in pay or furlough of 30 days or less—is entitled to appeal to the Merit Systems Protection Board (MSPB or the Board). See 5 U.S.C. 4303(e), 7513(d), 7701. In addition, an employee who, like the grievants in this case, is a member of a bargaining unit has the alternative of challenging adverse agency action through the grievance arbitration procedures contained in the collective bargaining agreement between his union and employer. 5 U.S.C. 7121(e)(1); see generally *Devine* v. *White*, 697 F.2d 421, 428 (D.C. Cir. 1983).

Both employees in this case elected to challenge their removals under the procedures established by the collective bargaining agreement between GSA and their union, respondent American Federation of Government Employees. The arbitrator (respondent Nutt) found (App., *infra*, 32a) that the grievants had committed the alleged acts "and thereby substantiated charges made against them sufficient under normal circumstances to justify their removal from government service." The arbitrator agreed (*id.* at 32a-34a) with the Union, however, that the employees had not been offered the op-

portunity to have a representative present during the interrogation, as required by Article XXVII, Section 2, of the collective bargaining agreement (see note 2, *supra*),[3] although he also observed (App., *infra*, 34a) that the grievants "were [not] entirely unaware of their right to representation during an investigative interview." Accordingly, the arbitrator concluded (*id.* at 35a): "Where, as here, a procedural irregularity may not have been prejudicial, the emphasis upon technicalities would be inconsistent with the informal atmosphere of the arbitration process and the end result could be quite ludicrous."

The arbitrator also agreed with the Union's contention that the Agency violated Article XXVII, Section 3, of a supplement to the collective bargaining agreement by failing to issue the notices of proposed removal within a reasonable time after it first learned of the offenses (App., *infra*, 36a-37a).[4] He further noted (*id.* at

[3] The arbitrator concluded (App., *infra*, 33a-34a) that while the statute (5 U.S.C. 7114(a)(2)(B)) guarantees an employee the right to have union representation at an investigatory interview only if he requests it, the relevant contractual provision further requires that the employee be advised of the right to representation.

[4] The relevant contract section provided (App., *infra*, 5a n.4):

> PROPOSED NOTICE: In the event an employee is issued a notice of proposed disciplinary or adverse action, that employee must be afforded and made aware of all his/her rights. These proposed notices shall be served on the employee(s) within a reasonable period of time (normally 40 calendar days) after the occurrence of the alleged offense or when the alleged offense becomes known to management.

As the court of appeals noted (*id.* at 5a n.5), the arbitrator overstated the delay between the date the Agency first became aware of the grievants' offenses (February 2) and the date on which the notices of proposed removal were issued to them (April 2). The arbitrator erroneously counted the 88-day period between February 2 and May 3, the date on which the grievants responded to the notices of proposed removal, in concluding that the Agency violated the contract provision (*id.* at 36a-37a).

37a-38a), however, that "[t]he Union has not claimed or attempted to show that the interests of the Grievants were in any way prejudiced by the inordinate delay in issuance of the notice of adverse action and I am not aware that arbitrators generally have penalized an employer for such procedural violations in the absence of some adverse effect upon the grievants."

Notwithstanding the arbitrator's explicit findings that the grievants had committed the alleged misconduct and that the procedural defaults had not prejudiced them, the arbitrator held that their removal from government service was not for just cause "[s]olely because of the Agency's pervasive failure to comply with the due process requirements of the [collective bargaining] agreement" (App., *infra*, 38a). The arbitrator reduced the penalties imposed on the grievants from removal to two weeks' suspension without pay (*id.* at 38a-39a).

3. Pursuant to 5 U.S.C. 7703(d) and 7121(f), petitioner, the Director of the Office of Personnel Management, sought review of the arbitrator's decision by the United States Court of Appeals for the Federal Circuit. The court of appeals granted the petition for review and a five-judge panel heard petitioner's appeal.[5]

[5] As of October 1, 1982, the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 38, 28 U.S.C. 1295(a)(9), vested exclusive jurisdiction in the Federal Circuit over appeals brought pursuant to 5 U.S.C. 7703(d). Petitioner is entitled to seek review by that court if he "determines, in his

The court of appeals affirmed the decision and award of the arbitrator in all but one respect (App., *infra*, 1a-16a).[6] The court acknowledged (*id.* at 10a (see also *id.* at 5a)) that the violations of the collective bargaining agreement "were not personally prejudicial to grievants Rogers and Wilson." It further held, in view of Congress's express intent "to promote consistency * * * and to avoid forum shopping" (H.R. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978)), that the "harmful error" standard, which the MSPB is required to apply when reviewing adverse agency action (5 U.S.C. 7701(c)(2)(A)), also must be employed by arbitrators "in deciding whether a grievant was personally prejudiced." Nevertheless, the court of appeals concluded (App., *infra*, 12a (emphasis added)) that "the arbitrator can take account of significant violations of the collective bargaining agreement, important to the union, *even though the particular grievants may not have been themselves adversely affected.*" The court explained (*id.* at 12a-14a (emphasis by the court)):

> The union is a major (if not *the* major) party to the arbitration and its proper interests are to be protected, even though the interests of the particular grievants may not, alone, call for protection.
>
> * * * * *
>
> [T]he presence in the contract of these procedural safeguards concerning representation and notice is evidence of their substantiality and importance to the union and its members covered by the agreement. * * * They also appear, of themselves, to be significant measures for the union and its members. * * * Violations of explicit and important procedural rights contained in a contract, such as these, could fairly be said to be tantamount to "harmful error" to the union within the scope of 5 U.S.C. § 7701(c)(2)(A) (1982) for the purposes of collective bargaining arbitration in which the union is a proper party.

Accordingly, the court of appeals sustained the arbitrator's reduction of the grievants' penalties, except to the extent that Rogers' penalty, as reduced, fell below the statutory minimum for the unauthorized use of a government vehicle (see note 6, *supra*).

REASONS FOR GRANTING THE PETITION

This case presents a question of paramount importance to the operation of the comprehensive scheme for processing federal employee adverse action appeals established by Congress in the Civil Service Reform Act of 1978. The court of appeals' decision largely eviscerates the statutorily prescribed "harmful error" rule in the context of arbitral review of adverse agency action. Moreover, contrary to Congress's express intent, the decision below creates two distinct standards for re-

---

discretion, that [an error has been made] in interpreting a civil service law, rule or regulation affecting personnel management and that the * * * decision will have a substantial impact on a civil service law, rule, regulation, or policy directive" (5 U.S.C. 7703(d)). Even where petitioner makes such a determination, however, the court of appeals nevertheless has discretion whether to grant the petition for judicial review (*ibid.*). In this case, the Union had suggested an en banc hearing on the merits in view of the importance of the questions presented and the fact that all subsequent petitions for review would be filed in the Federal Circuit. The court of appeals "denied the suggestion except to the extent that the case will be heard by a five judge panel" (June 24, 1983 letter from George E. Hutchinson, Clerk of the United States Court of Appeals for the Federal Circuit, to Charles A. Hobbie, Staff Counsel, American Federation of Government Employees, AFL-CIO). See 28 U.S.C. 46(b).

[6] The court of appeals agreed with petitioner that the arbitrator lacked authority to mitigate Rogers' penalty below the statutorily imposed minimum of one month's suspension for the unauthorized operation of a government vehicle (31 U.S.C. 1349(b)). App., *infra*, 14a-16a.

view of adverse agency action: one to be applied by arbitrators on appeals by bargaining unit employees and another to be applied by the Merit Systems Protection Board. The inevitable consequences of this ruling will be forum shopping by bargaining unit employees and the entirely disparate treatment of the two halves of the federal workforce, both in violation of the legislative will.

1. The Civil Service Reform Act of 1978, 5 U.S.C. 7701(c)(2)(A), provides that agency decisions imposing disciplinary action "may not be sustained * * * if the employee or applicant for employment shows harmful error in the application of the agency's procedures in arriving at such decision * * *." The MSPB has construed this "harmful error" standard in accord with its plain language, as requiring prejudice *to the individual employee*. Pursuant to the authority granted to it in 5 U.S.C. 7701(j), the Board has defined "harmful error" as:

> Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

5 C.F.R. 1201.56(c)(3).[7] Moreover, since the Board considers violations of adverse action procedures estab-

[7] See also *Parker* v. *Defense Logistics Agency*, 1 M.S.P.B. 489, 493 (1980) ("[u]nless it is likely that an alleged error affected the result, its occurrence cannot have been prejudicial. * * * Stated another way, the question is whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency"); *Fuiava* v. *Department of Justice*, 3 M.S.P.B. 217, 218 (1980); *Davies* v. *Department of the Navy*, 4 M.S.P.B. 83, 85 (1980).

lished by contract to be the equivalent of violations of procedural statutes or regulations, it applies the same "harmful error" standard where adverse agency action is challenged by a bargaining unit employee on account of violation of a procedural requirement contained in a collective bargaining agreement. See, *e.g.*, *Stalkfleet* v. *United States Postal Service*, 6 M.S.P.B. 536, 537, 539 (1981) ("[a]lthough appellant was not provided a written statement of the agency's reasons for refusing his request [for reassignment] as required by the National Agreement, he has failed to carry his burden of proof to show that the agency's failure to provide written notice constituted harmful error which would likely affect the result of the removal action") (citing *Fuiava* v. *Department of Justice*, 3 M.S.P.B. 217 (1980); *Parker* v. *Defense Logistics Agency*, 1 M.S.P.B. 489 (1980)); accord, *Battaglia* v. *Department of Health and Human Services*, 5 M.S.P.B. 212 (1981); *Giesler* v. *Department of Transportation*, 3 M.S.P.B. 367, 368 (1980), aff'd, 686 F.2d 844 (10th Cir. 1982).

The MSPB's construction and application of the "harmful error" standard are supported by the legislative history of the Civil Service Reform Act of 1978, which confirms that agency action may not be set aside except on account of procedural error that is harmful to the individual employee. The original Senate version of the bill that became the CSRA explicitly provided (S. Rep. 95-969, 95th Cong., 2d Sess. 179, 224 (1978) (emphasis added)) that "[a]n agency action shall be upheld by the Board, the administrative law judge, or the appeals officer unless—(A) the agency's procedures contained error that substantially impaired the rights *of the employee*." See also *id.* at 54. Although the lan-

guage was modified in the legislation as enacted, no substantive change in meaning was noted in the Joint Explanatory Statement of the Committee on Conference, which explained "the effect of the major actions agreed upon by the managers" of the two Houses of Congress (H.R. Rep. 95-1717, *supra*, at 127). In addition, the Board's interpretation of the "harmful error" rule is consistent with the definition that attaches to the phrase in other contexts (see, *e.g.*, *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6) and with the statute's imposition on the employee of the burden of proving harmfulness as an affirmative defense. See 5 U.S.C. 7701(c)(2); *Parker* v. *Defense Logistics Agency*, 1 M.S.P.B. at 492; see also 5 C.F.R. 1201.56(b)(1), (c)(3).

Although the court of appeals acknowledged (App., *infra*, 10a-12a & n.12) that, in view of 5 U.S.C. 7121(e)(2) and the relevant legislative history, the "harmful error" standard is applicable to arbitral, as well as MSPB, proceedings, the decision below in fact eviscerates the rule in the context of arbitral proceedings. Thus, while the court of appeals purported "to hold the arbitrator to the rule insofar as he decides the particular instance of the individual grievant" (App., *infra*, 11a (footnote omitted)), it further concluded that "the arbitrator can take account of significant violations of the collective bargaining agreement, important to the union, *even though the particular grievants may not have been themselves adversely affected*" (*id.* at 12a (emphasis added)). It is difficult indeed to conceive of what remains of a harmful error requirement where agency action can be set aside on account of "collective bargaining violations important to the union *but not*

prejudicial to the individual grievant" (*id.* at 11a (emphasis added)).

Furthermore, the decision below contains no effective limitation on the type of contractual provision that, if violated, would result in the setting aside of agency action regardless of the absence of prejudice to the individual employee. Rather, insofar as the court of appeals' opinion suggests (see App., *infra*, 14a), simply by virtue of the inclusion of a procedural right in a collective bargaining agreement, its violation would provide the basis for the setting aside or mitigation of agency action. Such a per se approach is the antithesis of the "harmful error" standard expressly prescribed by Congress to ensure that procedural irregularity would result in reversal of agency action "only if the procedures followed substantially impaired the rights of the employees" (S. Rep. 95-969, *supra*, at 64).

2. Standing alone, the court of appeals' misinterpretation of the "harmful error" provision in the arbitral context is serious, but perhaps not significant enough to warrant this Court's review. What is particularly distressing is that the decision below mandates wholly disparate treatment of the two halves of the federal workforce, in total contravention of express congressional intent. The Civil Service Reform Act of 1978 created a dual system for review of federal employee adverse action. As noted above (page 5, *supra*), while any employee who is the subject of adverse agency action may appeal to the Merit Systems Protection Board, an employee who is a member of a bargaining unit has the further alternative of challenging such agency action through the grievance arbitration procedures contained

in the collective bargaining agreement between his union and employer.

It was Congress's express intent, however, "in order to promote consistency in the resolution of these issues, and to avoid forum shopping" (H.R. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978)), that an employee's choice of procedural routes would not affect the applicable standard of review. The legislative history makes clear (*ibid.*) that "when considering a grievance involving an adverse action otherwise appealable to the MSPB * * * the arbitrator must follow the same rules governing burden of proof and standard of proof that govern adverse actions before the Board." This fundamental principle is manifested in 5 U.S.C. 7121(e)(2), which provides that arbitrators reviewing adverse agency action shall be governed by 5 U.S.C. 7701(c)(1), setting forth the standard of proof and burden of proof applicable to employee appeals to the MSPB. Likewise, arbitral decisions are subject to judicial review "in the same manner and under the same conditions as if the matter had been decided by the [MSPB]." 5 U.S.C. 7121(f). The Senate Report explains that the provision for judicial review of arbitral decisions was "intended to assure conformity between the decisions of arbitrators with those of the Merit Systems Protection Board" (S. Rep. 95-969, *supra*, at 111).

The court of appeals' decision frustrates these important congressional objectives. In view of the decision below, a bargaining unit employee with any conceivable claim that the agency violated procedures guaranteed him by the collective bargaining agreement would be foolish to seek review by the MSPB, rather than by an arbitrator. As a result, entirely disparate standards of

review will be applied to the two halves of the federal workforce. The 39% of federal employees who are not represented by unions will be able to challenge adverse agency action on account of procedural violations only if they can demonstrate that, in the absence of the alleged violation, the agency might have reached a different result;[8] by contrast, the 61% of federal employees who are bargaining unit members will not be required to make such a showing in order to have adverse action set aside. Such a system not only directly conflicts with Congress's announced desire "to promote consistency * * * and to avoid forum shopping;" it also represents manifestly unfair treatment of otherwise similarly situated federal employees.

3. Although the court of appeals acknowledged (App., *infra*, 8a) that an employee might well choose arbitration over an appeal to the MSPB if the "harmful error" standard were not fully applicable in arbitral proceedings,[9] the court concluded that such a distinction nevertheless was necessary in order to protect important *union* rights. But the fact that union rights may be implicated when collective bargaining agree-

---

[8] The Federal Circuit has expressly approved the MSPB's construction of the "harmful error" rule, as applied by the Board. See *Cheney* v. *Department of Justice*, 720 F.2d 1280, 1285 (1983); *Shaw* v. *United States Postal Service*, 697 F.2d 1078, 1080-1081 (1983); *Miguel* v. *Dep't of the Army*, No. 83-878 (Feb. 7, 1984), slip op. 11-12; see also *Brewer* v. *United States Postal Service*, 647 F.2d 1093, 1097 (Ct. Cl. 1981), cert. denied, 454 U.S. 1144 (1982).

[9] The court of appeals remarked (App., *infra*, 8a): "Employees who wish to appeal an agency's decision to discipline or remove them from service may choose arbitration, rather than an appearance before the Merit Systems Protection Board, depending upon the applicability of the 'harmful error' standard in arbitration proceedings."

ment provisions are violated is no justification for departing from clear congressional intent that agency disciplinary action involving an individual employee be set aside only on account of procedural error that caused harm to the *employee*.[10] This is particularly true where, as here, there exist alternative remedies by which union rights may be fully vindicated. In holding (App., *infra*, 13a (emphasis by the court)) that "important *union* rights are also to be enforced in the negotiated grievance procedure," the court of appeals overlooked entirely other provisions of the Civil Service Reform Act that afford unions ample opportunity to protect their own rights.

For example, 5 U.S.C. 7121(b)(3)(A) requires that a union be permitted "in its own behalf * * * to present and process grievances," and 5 U.S.C. 7103(a)(9)(C)(i) defines "grievance" as "any complaint by any * * * labor organization * * * concerning the effect or interpretation, or a claim of breach, of a collective bargaining agreement." Although, as a practical matter, most grievances filed by a union on its own behalf will likely be intended to remedy violations of the agreement that affect the interests of the union as an institution, the statutory authorization clearly encompasses grievances alleging violation of any type of contractual provision, including the notice and representation requirements involved in this case. As a remedy for the violation of such a provision, the union could request that the arbitrator order the employing agency to "cease and desist" from any further such violations. In addition, although the filing of a grievance in the context of the negotiated grievance procedures is the usual means of resolving questions of contract interpretation and breach, where the agency's "interpretation of the negotiated agreement was such that it resulted in a clear and patent breach of the terms of the agreement," the union also possesses the option of filing an unfair labor practice charge with the Federal Labor Relations Authority. *Iowa National Guard and National Guard Bureau*, 8 F.L.R.A. 500, 510 (1982); see also *Food Safety and Quality Service*, 7 F.L.R.A. 665, 672-673 (1982).

As these provisions demonstrate, Congress already has afforded unions adequate means to protect their own rights. Accordingly, the court of appeals erred in frustrating express legislative intent that bargaining unit and non-bargaining unit employees be similarly treated simply in order to provide yet another avenue for assuring vindication of union rights. Cf. *Brown* v. *GSA*, 425 U.S. 820 (1976).

4. We recognize that Congress created the United States Court of Appeals for the Federal Circuit in order to make possible "the definitive adjudication of selected categories of cases" without the need for intervention by this Court. S. Rep. 97-275, 97th Cong., 1st Sess. 3 (1981). Accordingly, requests by the government for review of decisions by the new court of appeals can be expected to be rare. Nevertheless, even as it created the Federal Circuit, Congress acknowledged that there would be some few cases of such widespread significance or patent erroneousness that review by this

[10] Indeed, even in the private sector, in which there is, of course, no statutory "harmful error" rule, arbitrators frequently refuse to set aside management action on account of technical violations of procedures contained in the collective bargaining agreement "where the employee had not been adversely affected by the failure of management to accomplish total compliance with the requirements." F. Elkouri & E. Elkouri, *How Arbitration Works* 634 (3d ed. 1973) (footnote omitted).

Court would be warranted. See H.R. Rep. 97-312, 97th Cong., 1st Sess. 18-19 (1981). After consulting with affected federal agencies, the Solicitor General has determined that this is such a case.

Indeed, all of the entities involved in the proceedings below agree that this is a case of exceptional systemic importance. In granting the petition for judicial review of the arbitrator's award, the court of appeals emphasized (App., *infra*, 8a) that the question presented by this case "indisputably will have a substantial impact upon civil service law." Likewise, as noted above (note 5, *supra*), the Union suggested an en banc hearing in view of the importance of the questions presented and the fact that all subsequent petitions for review will be filed in the Federal Circuit.

These views are entirely well founded. The decision below, if permitted to stand, will result in a substantial and unjustified difference in treatment between the 1.2 million federal employees who are members of a bargaining unit and the 800,000 federal employees who are not.[11] For example, under the court of appeals' reasoning, if two employees of the same agency committed the same offense and the agency committed procedural error that prejudiced neither, one employee nonetheless might lose his job, while the other might suffer only a two-week suspension, simply because the second employee was represented by a union (and thus had the option of choosing grievance arbitration rather than an appeal to the MSPB) while the first was not. Such a result is so inequitable as to call for this Court's intervention.

[11] Figures taken from Office of Policy and Communications, OPM, *Union Recognition in the Federal Government* 30 (1983); OPM, *Federal Personnel Manual Bulletin No. 711-89*, Attach. 2, at 10 (Dec. 1, 1983).

Review by this Court of the decision below is particularly appropriate because this case may present the last clear opportunity for petitioner to challenge the Federal Circuit's disparate construction of the "harmful error" rule. As noted above (note 5, *supra*), petitioner is entitled to seek judicial review by the Federal Circuit only if he "determines, in his discretion, that [an error has been made] in interpreting a civil service law, rule or regulation affecting personnel management and that the * * * decision will have a substantial impact on a civil service law, rule [or] regulation" (5 U.S.C. 7703(d)). Moreover, even if this determination is made, review by the Federal Circuit is discretionary with that court (*ibid.*). The Federal Circuit has recently indicated that it will decline to exercise its discretion to entertain appeals where the question presented involves merely the application of previously settled law to the facts of a particular case. See *Devine* v. *Sutermeister*, 724 F.2d 1558, 1566 (1983). In light of the decision below, the court of appeals may view any future case that raises the same "harmful error" issue as involving merely the application of settled law to particular facts and, for that reason, decline to exercise its discretion to grant a petition for judicial review. In those circumstances, this issue of extreme importance to millions of federal employees might well be insulated from any consideration by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
BARBARA E. ETKIND
Assistant to the Solicitor General
DAVID M. COHEN
GEORGE M. BEASLEY, III
Attorneys

APRIL 1984

APPENDIX A
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 83-589

DONALD J. DEVINE, PETITIONER,

v.

ALLISON E. NUTT, ET AL., RESPONDENTS.

DECIDED: September 22, 1983

Before DAVIS, NICHOLS, BALDWIN, KASHIWA and MILLER, *Circuit Judges.*

DAVIS, *Circuit Judge.*

Donald J. Devine, Director of the Office of Personnel Management, brings this petition for review of an arbitration award, issued by respondent Nutt, pursuant to 5 U.S.C. § 7703(d) (1982).[1] Petitioner also named the

---

[1] 5 U.S.C. § 7703(d) (1982) provides:

> (d) The Director of the Office of Personnel Management [OPM] may obtain review of any final order or decision of the [Merit Systems Protection] Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of

American Federation of Government Employees (the union) and the Government [*sic*] Services Administration (the employing agency) as respondents. Director Devine urges us to reverse the arbitrator's award, which mitigated the employing agency's removal of grievants-employees Wilson and Rogers to two-week suspensions without pay. The union, in turn, urges that we deny the petition for review, on the ground that it was untimely filed, and, in any event, because we have discretion to decline the appeal. On the merits, the union urges us to uphold the award.

As the following discussion shows, we find petitioner's submission to be timely filed and we exercise our discretion to grant petitioner's request for review. We affirm the arbitrator's award as to Wilson, but modify his award with respect to Rogers.

I

The facts do not provide an example of model conduct by government employees. Grievants Wilson and Rogers were employed by the Government [*sic*] Services Administration as Federal Protective Service (FPS) officers in the Denver, Colorado area. On January 7, 1982, Rogers, while on patrol in an official government vehicle, drove to his residence in a nearby suburb and picked up several cans of beer at his supervisor's request; he then returned to the FPS command center and delivered the beer to his supervisor. The supervisor consumed the beer and then left the empty cans at

---

the petition for judicial review shall be at the discretion of the Court of Appeals.

This statute is made applicable to adverse action arbitrations by 5 U.S.C. § 7121(f) (1982).

the command post when he went off duty. Alarmed at the prospect of discovery, the supervisor later telephoned Wilson, who was then on duty at the command post, instructing Wilson to alter the monitor tapes of telephone conversations between the command post and patrolling FPS officers to include a spurious explanation for the presence of the empty cans in the command post. Wilson complied with the supervisor's request.

Subsequently, an FPS official, who was monitoring the tapes for other purposes, discovered irregularities in the tapes which led her to believe that Wilson and the supervisor had attempted to edit them in an attempt to conceal the consumption of the beer at the command post. Special agents of the GSA commenced an investigation of the incident. Two such agents confronted Rogers at his home and requested him to accompany them to a local police station for a "non-custodial" interrogation concerning the irregularities. The agents took notes throughout the interview. At no time was Rogers informed that he was entitled to have a union representative present at the interview.[2] The same special agents later interviewed Wilson in a similar fashion; they did not advise Wilson of his right to

---

[2] Article XXVII, Section 2 of the collective bargaining agreement between GSA and the grievants' union, the American Federation of Government Employees, provides:

> The Employer agrees that during formal discussion where interrogation or written or sworn statements are taken from an employee, in connection with a charge that may result in disciplinary action against him, he will have the opportunity to have a representative present. It should be understood that counseling sessions are not formal discussions.

representation at the investigatory interview. Approximately one month after these sessions, the special agents met separately with each of the grievants and asked them to sign affidavits composed from the agents' notes taken in the previous interviews. The grievants complied with the agents' request; during these later interviews, they once again were not alerted to their right to union representation as specified in the collective bargaining agreement.

On April 2, nearly three months after the alleged incidents of wrongdoing, both grievants received proposed notices of removal from their positions. After receiving written responses to the charges, the employing agency issued a removal notice to Wilson for falsification of tape recordings and attempting to conceal activities of record. Rogers received a removal notice for falsification of records, failure to report irregularities, and use of a government vehicle for non-official purposes.

Both grievants requested arbitration of their removals, as they were entitled to do under their union's collective bargaining contract. The arbitrator (respondent Nutt) found that the grievants committed the alleged acts of wrongdoing.[3] He concluded, however, that the grievants "were not given an opportunity to have a [union] representative present" as required by the collective bargaining agreement, though he also determined that the grievants were not "unaware of their right to representation during an investigatory interview." The arbitrator also agreed with the union's con-

[3] The union did not contest the facts upon which the arbitrator based this finding.

tention that the agency violated Article XXVII, Section 3[4] of a supplement to the collective bargaining agreement by permitting an unreasonable period of time to elapse between the issuance of the proposed notices of removal and the date when the agency first learned of the offense.[5] The arbitrator declared, on the other hand, that the union did not claim or demonstrate any prejudice *to the grievants* due to the failure to have union representation or to the "inordinate delay" in the issuance of the notices of proposed removal. But the arbitrator concluded that "[s]olely because of the agency's pervasive failure to comply with the due process requirements of the agreement,"[6] the grievants' removal was not for just cause. The award reduced the removals to two-week suspensions without pay.

---

[4] That contract section provides, in pertinent part:

> PROPOSED NOTICE: In the event an employee is issued a notice of proposed disciplinary or adverse action, that employee must be afforded and made aware of all his/her rights. These proposed notices shall be served on the employee(s) within a reasonable period of time (normally 40 calendar days) after the occurrence of the alleged offense or when the alleged offense becomes known to management.

[5] The arbitrator apparently miscalculated the period of time which elapsed between when the agency first became aware of the offense (February 2) and the date when the proposed notices of removal were issued to grievants (April 2). The arbitrator erroneously stated that the notices were issued on May 3; on that day, grievants actually submitted their formal written responses to the April 2 proposed notices.

[6] The arbitrator likewise found that the agency early (February 4, 1982) instructed employees who were being interviewed in the general investigation not to discuss those interviews with any other persons. The union charged this was a "gag" rule. The arbitrator did not find that this so-called "gag" rule prejudiced Rogers or Wilson.

The arbitrator issued his award on July 16 and subsequently issued a revised award on July 31.[7] Petitioner received the notice of award on August 12 and filed a request for reconsideration of the award with the arbitrator on September 13, pursuant to his understanding of 5 U.S.C. § 7703(d) (1982). *See supra* note 1. On October 13, the arbitrator denied reconsideration in a terse statement which petitioner received on October 15. Then, on November 14, petitioner filed his request to this court for judicial review of the arbitrator's award.

II

At the outset, the union argues that petitioner failed to file his request for reconsideration of the arbitrator's award and his petition for review in this court in a timely fashion. In an earlier order, another panel of this court held that the petition for review in this case was timely filed because director Devine was entitled to seek reconsideration by the arbitrator. *Devine* v. *Nutt*, No. 83-589 (Fed. Cir. Apr. 12, 1983) (order).[8] We now find the union's remaining contention on timeliness—relating to the timeliness of petitioner's request for reconsideration—to be meritless.

[7] The revised award simply clarified grievants' suspension; they were to be suspended for two weeks without pay, rather than a period of "not less than two weeks without pay," as the original award provided.

[8] In that order, this court put its holding upon the grounds that the OPM was not a party before the arbitrator, that OPM's position on the issues raised in the appeal may differ from those of either party to the arbitration, and that meaningful appellate review of the arbitrator's decision on the basis of the OPM objections is hardly possible unless the arbitrator knows of the OPM objections and has a chance to modify his decision to conform to them, or to state his reasons for not doing so.

The Director received the arbitrator's revised award on August 12, 1982. We have previously decided that the time for filing a request for reconsideration "runs from the date the Director receives notice of the decision of the ... arbitrator...." *Devine* v. *Sutermeister*, No. 83-814 (Fed. Cir. June 2, 1983) (order). Petitioner's request for reconsideration by the arbitrator was filed on Monday, September 13, 1982. A cursory reading of the rule governing computation of time reveals that the petition was timely filed—the weekend preceding petitioner's filing could not be included in the 30-day required period. *See* Fed. R. App. P. 26(a). We therefore hold that petitioner's request for reconsideration of the arbitrator's award was timely.

III.

We must also decide whether this court should exercise its discretion to review the arbitrator's award. *See* 5 U.S.C. § 7703(d) (1982), *supra* note 1. The statute authorizes the Director of OPM to request judicial review of an arbitrator's decision if he believes that the arbitrator erroneously interpreted civil service statutes or regulations—with the result that the decision "will have a substantial impact" on civil service law. *See id.*; *Devine* v. *White*, 697 F.2d 421, 434 (D.C. Cir. 1983). Of course, petitioner's assessment of substantial impact is not binding on this court. In determining whether we should exercise our discretion, we must balance the desirability of review against the traditional labor policy of judicial deference to arbitrators' decisions. *See United Steelworkers* v. *Enterprise Wheel & Car Corp.*,

363 U.S. 593, 596 (1960); *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 569 (1960); *White*, *supra*, 697 F.2d at 434-36.

We find it appropriate to exercise our discretion to consider the merits of the petition in this case. This conclusion is buttressed by the District of Columbia Circuit's recent decision in *White*, *supra*. Here, as there, the controversy between the parties does not proceed primarily from the arbitrator's factfinding or his evaluation of the language contained in the collective bargaining agreement. Rather, the key issue in this case, as in *White*, is the applicability of the "harmful error" standard contained in 5 U.S.C. § 7701(c)(2)(A) (1982)[9] in adverse action proceedings that are brought to arbitration pursuant to 5 U.S.C. § 7121(e) (1982). That issue is one of first impression in this court; its resolution indisputably will have a substantial impact upon civil service law. Employees who wish to appeal an agency's decision to discipline or remove them from service may choose arbitration, rather than an appearance before the Merit Systems Protection Board, depending upon the applicability of the "harmful error" standard in arbitration proceedings. *Cf. White*, *supra*, 697 F.2d at 440-41.

---

[9] In essence, the "harmful error" standard recognized that an agency's adverse action against an employee cannot be sustained by the Merit Systems Protection Board (MSPB) if the employee can demonstrate (1) that the agency violated proper procedures in its decision to discipline or remove the employee and (2) that the procedural error substantially impaired the rights of the employee. *See* 5 U.S.C. § 7701(c) (1982); *cf. Shaw* v. *United States Postal Service*, 697 F.2d 1078, 1080 (Fed. Cir. 1983). *See infra* Part IV.

We should also exercise jurisdiction here in order to settle a related issue of substantial importance to civil service law—the proper place of external (*e.g.*, statutory) law in adverse action arbitration. *See id.*, 697 F.2d at 438. Judicial deference to an arbitral award may be inappropriate when the award is in apparent conflict with a federal statute that is distinct from the operation of the collective bargaining agreement. In the present case, Arbitrator Nutt mitigated the agency's removal of grievant Rogers for unauthorized use of a government vehicle in a fashion apparently inconsistent with the command of the statute governing such offenses.[10]

In exercising our jurisdiction over this petition, we are mindful of the traditional federal policy favoring arbitration of labor disputes, *see Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 458-59 (1957), and the solicitude that the federal courts have generally accorded to arbitral awards over the years. *See United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Yet we cannot accept the union's invitation to abdicate our responsibility to review those awards that may conflict with statutory authority. If we were to decline review solely because arbitral awards are said to have little precedential value, we would be in effect foreclosing all judicial review of adverse action arbitration. That result would contradict

---

[10] 31 U.S.C. § 1349(b) (1982) provides, in relevant part, that:

> An officer or employee who willfully uses or authorizes the use of a passenger motor vehicle or aircraft owned or leased by the United States Government . . . shall be suspended without pay by the head of the agency. The officer or employee shall be suspended for at least one month, and when circumstances warrant, for a longer period or summarily removed from office.

the Congressional mandate, contained in § 7703(d), authorizing us to review awards that have a substantial impact upon civil service law. Accordingly, we grant the petition for review and exercise our jurisdiction here.

IV

We turn to the question of whether and to what extent the "harmful error" standard—required by statute to be applied in MSPB review of agency adverse actions, *see* 5 U.S.C. § 7701(c)(2)(A) (1982)[11]—must be employed in adverse action arbitration. *See supra* note 9. Our holdings are that (1) arbitrators should take account of "harmful error" in deciding whether a grievant was personally prejudiced, but (2) there can be violations of the collective bargaining agreement, not prejudicial to the particular grievant, that the union may raise on its own behalf in the grievance proceeding and which are to be taken into account in making the ultimate award, and (3) in this case there were such violations which the arbitrator properly took into account (except as discussed in Part V, *infra*) even though those violations were not personally prejudicial to grievants Rogers and Wilson.

A.

Congress has decreed that the MSPB must uphold agency adverse actions taken to promote the efficiency of the service if they are supported by a "preponderance of the evidence." *See* 5 U.S.C. § 7701(c)(1)(B)

[11] That provision states that the MSPB shall not sustain an agency's decision if the affected employee "shows harmful error in the application of the agency's procedures in arriving at such decision."

(1982). Statutory authority explicitly requires arbitrators to sustain such agency adverse actions if they are supported by a preponderance of the evidence. *Id.* § 7121(e)(2) (1982). The Civil Service Reform Act does not make it as clear whether (and, if so, in what form) the arbitrator must utilize the "harmful error" test of § 7701(c)(2). We agree, though, with the court in *Devine* v. *White*, 697 F.2d 421, 441 (D.C. Cir. 1983), that "harmful error" applies to determining whether the particular grievant has been prejudiced (even though we also think, as discussed below, that an arbitral award can nevertheless be based on collective bargaining violations important to the union but not prejudicial to the individual grievant).

The legislative history of the Civil Service Reform Act relating to arbitration of adverse action decisions states that "the arbitrator must follow the same rules governing burden of proof and standard of proof that govern adverse actions before the Board." H.R. Rep. No. 1717, 95th Cong., 2d Sess. 157, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2860, 2891. Congress also wanted "to promote consistency ... and to avoid forum shopping." H.R. Rep. No. 1717, *supra*, at 157, 1978 U.S. Code Cong. & Ad. News 2891. Because the "harmful error" provision can appropriately be regarded as part of the "standard of proof" (if not of the burden of proof itself) with respect to the individual grievant, it is proper to hold the arbitrator to the rule insofar as he decides the particular instance of the individual grievant.[12]

[12] Though § 7121(e)(2) of the Reform Act (Title 5, U.S. Code), *supra*, specifically incorporates only § 7701(c)(1), *supra*,

But like the *White* court, *supra*, 697 F.2d at 443, *see id.* at 446 (Bork, J., concurring), we also hold that the arbitrator can take account of significant violations of the collective bargaining agreement, important to the union, even though the particular grievants may not have been themselves adversely affected. The union is a major (if not *the* major) party to the arbitration and its proper interests are to be protected, even though the interests of the particular grievants may not, alone, call for protection. Congress so recognized the role of unions and collective bargaining agreements. The Reform Act expressly provides that management prerogatives shall not "preclude any agency and any labor organization from negotiating ... procedures which management officials of the agency will observe in exercising [their] authority" to discipline and remove employees. 5 U.S.C. § 7106(b) (1982). In the contract here, the union and the agency agreed to institute procedures that provide employees with union representation at investigatory interviews and timely notice of proposed adverse action within a reasonable period after the offense or its discovery. These procedural safeguards, established by collective agreement, effectively become union rights. In the Reform Act, Congress also expressly provided that, in adverse action cases of this type, a "collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability" (5 U.S.C. § 7121(a)(1) (1982)), and recognized that, in matters of this kind

---

the latter is made "Subject to paragraph 2 of this subsection" (*i.e.*, § 7701(c)(2), the "harmful error" provision) and can therefore be read, in view of the legislative history, as likewise incorporating § 7701(c)(2).

raised under the negotiated grievance procedure, the union should be the representative and there should be binding arbitration (if necessary). 5 U.S.C. § 7121(b)(2)(b) (1982). We think this statutory scheme means that important *union* rights are also to be enforced in the negotiated grievance procedure.

In short, we recognize that adverse action arbitrations "are statutorily required to be similar to MSPB hearings in some respects but in other respects may be different." *See Otherson* v. *INS*, No. 82-1991, slip op. at 10 (D.C. Cir. June 21, 1983).

B.

Applying these principles to grievant Wilson, we hold that the arbitrator's award of a two-week suspension without pay is entitled to finality and should be affirmed. The award draws its essence from the collective bargaining agreement, *see United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), and is not in conflict with civil service statutory or regulatory authority. *See White*, *supra*, 697 F.2d at 440.

The arbitrator concluded that the agency violated at least two provisions of the collective bargaining agreement in its investigation of Wilson's misconduct. First, he found that "the Agency did not give the Grievants an opportunity to have a [union] representative present during the investigation" as required by the agreement. Jt. App. 29; *see supra* note 2. Second, the arbitrator determined that the agency violated another contract provision by failing to give timely notice of its proposed decision to remove grievants. Jt. App. 31; *see supra* note 4. In the arbitrator's opinion, this "pervasive failure to comply with the due process requirements of the

agreement" justified mitigation, though he also found Wilson and Rogers not to have been personally prejudiced.

As we have said, the arbitrator's award, in this respect, did not controvert any civil service law or regulation. In addition, the presence in the contract of these procedural safeguards concerning representation and notice is evidence of their substantiality and importance to the union and its members covered by the agreement. *See White, supra*, 697 F.2d at 443. They also appear, of themselves, to be significant measures for the union and its members. Viewed in this light, the arbitrator's decision to uphold and enforce the vitality of these provisions by, in effect, penalizing the agency for disregarding them was reasonable and within the scope of his authority. *See Enterprise Wheel & Car Corp., supra*, 363 U.S. at 597. Violations of explicit and important procedural rights contained in a contract, such as these, could fairly be said to be tantamount to "harmful error" to the union within the scope of 5 U.S.C. § 7701(c)(2)(A) (1982) for the purposes of collective bargaining arbitration in which the union is a proper party. *See White, supra*, 697 F.2d at 443; *id.* at 446 (Bork, J., concurring). For that reason, we cannot disturb the award as to Wilson.

V

We cannot, however, sustain that portion of the arbitrator's award which reduced grievant Rogers' removal to a two-week suspension; there was an error of law in mitigating that penalty. *See Devine* v. *White*, 697 F.2d 421, 440 (D.C. Cir. 1983).

Although the arbitrator is free to make an award consonant with the scope of the collective bargaining agreement, *see United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), he must not issue awards that conflict with "external law" such as federal statutes and regulations. *See White, supra*, 697 F.2d at 438. In requiring Rogers to serve a two-week suspension for unauthorized use of a patrol vehicle, the arbitrator disregarded the explicit mandatory requirement of 31 U.S.C. § 1349(b) (1982), *see supra* note 9. That section commands that "[a]n . . . employee who willfully uses" a government vehicle for unauthorized purposes "*shall* be suspended *for at least one month*. . . ." (emphasis added). The Court of Claims, whose precedents are binding upon us,[13] has previously interpreted this statute to require, at a minimum, a one-month suspension for its violation. *Clark* v. *United States*, 162 Ct. Cl. 477, 486-87 (1963).

The union contends that some question exists as to whether Rogers actually committed an infraction of § 1349(b), because the arbitrator made no finding as to whether Rogers' use of the vehicle was authorized. That contention is groundless. Many "authorized purposes" may exist for use of a government vehicle, but they do not include frolics and detours—even at the behest of a supervisor—in order to procure alcoholic beverages for on-duty consumption. Government employees must know at least that much.

We hold, then, that the arbitrator erred as a matter of law in mitigating grievant Rogers' removal to a two-

[13] *South Corp.* v. *United States*, 690 F.2d 1368, 1371 (Fed. Cir. 1982).

week suspension.[14] Mindful of the prophylactic nature of mitigation in this case, *see supra* Part IV, we modify the arbitrator's award, with respect to Rogers, to a one-month suspension without pay, in accordance with § 1349(b).

VI

We affirm the arbitrator's award as to grievant Wilson in all respects. Grievant Rogers' award is modified to the extent that he should serve a full one-month suspension without pay in accordance with the terms of 31 U.S.C. § 1349(b) (1982).

Affirmed as modified.

[14] In this respect we apparently disagree with *White*, *supra*, 697 F.2d at 427 n.11, if that holding was meant to apply to the minimum statutory penalty.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 83-589

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER,

v.

ALLISON E. NUTT, ARBITRATOR;
GENERAL SERVICES ADMINISTRATION; AND
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3275, RESPONDENTS

ON MOTION

[Filed Apr. 12, 1983]

ORDER

Before NICHOLS, BALDWIN, and KASHIWA, *Circuit Judges*.

Having considered the submissions of the parties, the court orders that respondents' MOTION TO DISMISS FOR FAILURE TO TIMELY FILE PETITION FOR REVIEW in the above-named case is denied.

DISCUSSION

Petitioner (Director) seeks judicial review of an arbitrator's decision and award issued by respondent Nutt (arbitrator) pursuant to the grievance procedures set out by the Civil Service Reform Act of 1978 (Act), 5 USC 7121 (1978). Respondents now move for dismissal

of the Director's petition for review, contending that (1) 5 USC 7121(f) and 5 USC 7703(b)(1) together require that a petition for review of an arbitrator's decision must be filed within 30 days after petitioner's receiving notice of the final decision of the arbitrator; and (2) the Director, having failed to file within 30 days of the arbitrator's decision in this case, cannot evoke [*sic*] this court's jurisdiction under 5 USC 7703(d). The Director responds that he was required by § 7703(d) to petition the arbitrator for reconsideration of the latter's decision before an appeal therefrom could be taken; since a petition for judicial review was filed within 30 days of the arbitrator's denial of the petition for reconsideration, the Director argues, the petition for review must be deemed timely filed. We agree with the Director and, therefore, deny respondents' motion to dismiss.

We are not convinced that the Director is precluded from seeking reconsideration of the arbitrator's original decision, as respondents maintain. On the contrary, the Act expressly provides that the Director must have petitioned the Merit Systems Protection Board (board) for reconsideration of a board decision, either before or after the decision becomes final, as a prerequisite for the Director's seeking judicial review of the decision. 5 USC 7701(e)(1)(A), 7703(d) (1978). The Act also mandates that an arbitrator's decision concerning matters covered under 5 USC 4303 or 7512 be treated for purposes of judicial review "as if the matter had been decided by the [b]oard." 5 USC 7121(f) (1978). Accordingly, we conclude from the Act's plain language that the Director was required to petition the arbitrator for reconsideration, as he would the board, before filing the present petition for review. Moreover, as the board is required to give due consideration to such a petition for reconsideration, so too is the arbitrator.

Thus, we reject respondent's contention that Congress failed to provide for participation by the Director in arbitral decision making. Since the significance of the Director's potential involvement in proceedings related both to decisions by the board and the arbitrator was emphasized during legislative hearings on the Act,* Congress' equating of the board and arbitrator decisions for judicial review purposes can hardly be considered accidental. Moreover, the Senate Report on the Act states, concerning what became 5 USC 7703(d), that:

> The Committee amended this section to emphasize that the [Office of Personnel Management] should seek *judicial review* only in those exceptional cases where it finds that the Board erred, as a matter of law, in interpreting the civil service laws, and that the erroneous decision will have a substantial impact on how aspects of the civil service rules are interpreted in the future. * * * In order to avoid unnecessary appeals by the Director, the provision also requires the Director to petition the Board for reconsideration of its decision in those cases where the Director was not involved in the case at the Board level. This will make sure the Board has an opportunity to consider the concerns of [the Office of Personnel Management] before suit is brought. The Director, like any other petitioner, is required to seek *review* within 30 days of the decision of the Board.

---

*See *Civil Service Reform: Hearings on H.R. 11280 Before the House Comm. on Post Office and Civil Service*, 95th Cong., 2d Sess. 718 (1978) (testimony of Kenneth T. Blaylock); *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S.2640, S.2707, and S.2830 Before the Senate Committee on Governmental Affairs*, 95th Cong., 2d Sess. 1076-77 (1978) (statement of Kenneth T. Blaylock).

S. REP. NO. 969, 95th Cong., 2d Sess. 64, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2723, 2786 (emphasis added). From the foregoing, we conclude that Congress intended (1) that denial of a petition for reconsideration by the board (or, by virtue of § 7121(f), by an arbitrator) be mandatory on the Director, and (2) that the Director petition for judicial review within 30 days of a denial of the requisite [*sic*].

In addition, we note that while an arbitration scheme applicable to negotiations in the private sector might not encompass a petition for reconsideration, the statutorily mandated, governmental arbitration scheme clearly envisions that the Director's petition for reconsideration be treated as an integral part of the arbitration scheme, preliminary to judicial review. Judicial review cannot be complete without knowledge of the arbitrator's position respecting matters, if any, urged by the Director that were not raised initially by the immediate parties to the arbitration.

Since the Director's petition for review in this case was filed within 30 days of the arbitrator's denial on reconsideration, the petition is deemed timely filed.

FOR THE COURT

/s/ Phillip B. Baldwin
PHILLIP B. BALDWIN
Circuit Judge

APRIL 12, 1983

APPENDIX C

In the Matter of Arbitration Between

GENERAL SERVICES ADMINISTRATION, REGION 8
(UNITED STATES GOVERNMENT), EMPLOYER,

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL NO. 3275, UNION,

Concerning the Discharges of

THOMAS F. ROGERS AND
ROBERT WILSON, GRIEVANTS.

JULY 16, 1982

DECISION AND AWARD OF ALLISON E. NUTT

This matter was heard in Denver, Colorado on July 7, 1982, pursuant to the expedited arbitration provisions of the applicable collective bargaining agreement. The Employer (hereafter the "Agency") was represented by Patricia Hughes, Esq., Attorney-Advisor, and Liova Juarez, Esq., Attorney-Advisor, jointly. The Union was represented by Kenneth J. Bull, National Representative. The undersigned arbitrator was selected through procedures of the American Arbitration Association.

THE ISSUE

Was the removal of the Grievants from government service for just cause? If not, what is the remedy?

CONTRACT PROVISIONS

"Section 1.

1. For the purpose of this Agreement, a disciplinary action consists of 'letters of warning, letters of reprimand, and suspensions of thirty (30) days or less.' Disciplinary actions will only be taken for just and sufficient cause. Grievance resulting from disciplinary action must be grieved to the next higher level of authority above the official initiating the disciplinary action in accordance with the provisions of Article XX. Disciplinary actions are distinguished from corrective actions, such as close supervision, on-the-job training and constructive counseling (written or oral).

2. Normally oral admonitions and warnings are steps taken before disciplinary actions.

Section 2. The Employer agrees that during formal discussion where interrogation or written or sworn statements are taken from an employee, in connection with a charge that may result in disciplinary action against him, he will have the opportunity to have a representative present. It should be understood that counseling sessions are not formal discussions."

SUPPLEMENT #1

"Section 1. *GENERAL:* The basic procedures and rights of employees, as outlined in appropriate regulations, shall be observed in handling disciplinary and adverse actions. Such actions must be consistent with applicable laws and regulations."

"Section 2. *DEFINITIONS:*

(b) Adverse Actions: An adverse action is a discharge, suspension for more than fourteen (14) days, furlough without pay, or reduction in grade

or pay. All procedures and practices set forth in the Federal Personnel Manual shall apply."

"Section 3. *PROPOSED NOTICE:* In the event an employee is issued a notice of proposed disciplinary or adverse action, that employee must be afforded and made aware of all his/her rights. These proposed notices shall be served on the employee(s) within a reasonable period of time (normally 40 calendar days) after the occurrence of the alleged offense or when the alleged offense becomes known to management. In all cases, the employees and/or Union representative shall be given the opportunity to review any and all evidence used and to reply to the charges orally and/or in writing, using the assistance of the Union as desired as per Article XX, Section 3. Evidence against an employee shall be made available to the employee and representative insofar as permitted, and both shall be given time to review such evidence and prepare a reply.

STATEMENT OF THE CASE

Grievants are employed as Federal Protective Officers at the Denver Federal Center (DFC), Denver, Colorado. During December, 1981 and January, 1982 both were assigned to Shift 3 (10:00 p.m. to 6:00 a.m.). Grievant Rogers patrolled property owned or leased by the Federal Government at various locations in the Denver metropolitan area while maintaining contact either by radio or by telephone with the DFC Command Center which on Shift 3 was manned solely by Grievant Wilson whose title was Dispatcher. The Command Center is located in Building No. 1 which also contains the office of the shift Commander (supervisor), Sergeant

Charles R. Henkes. All dates herein are in 1982 unless otherwise stated.

The Dispatcher's office contains control panels and equipment for transmitting and receiving radio and telephone communications to and from officers in the field. In addition it is equipped with tape recording equipment which operates continuously except that at the end of the day, 11:59 p.m., the single tape used for the day (hereafter referred to as the primary tape) must be replaced by a blank tape which then runs for the ensuing twenty-four hour period. The recorder contains a secondary tape which is automatically activated if the primary tape is stopped for any reason and runs only until the primary tape starts running again. The secondary tape becomes the primary tape for the following day and so may contain material recorded for both days—depending upon whether the primary tape stopped at any time. The recorder records everything, both incoming and outgoing, that is spoken over the radio and telephone lines of the Command Center and the tape is considered the basic essential record of all activity. The Dispatcher's normal activity in connection with the recorder is to change the tape at midnight, inserting a used tape which has been erased magnetically and filing the used tapes which are reused after thirty-one days.

On January 7, Grievant Rogers was on Post 106 in east Denver driving an official government car when he had a telephone conversation with Sgt. Henkes who suggested that he bring some beer back to the Command Center. Rogers drove to his home in Aurora, a Denver suburb, and picked up four cans of beer which he delivered to Henkes.

On January 8, Sgt. Henkes returned to the Command Center with five cans of beer he had found on DFC property. After drinking the beer Henkes left the empty cans in the Command Center and the following day became concerned that the unexplained presence of the beer cans would lead to discovery of his drinking the beer. Henkes was off duty and called Grievant Wilson, whose shift had started at 10:00 p.m. and arranged for Wilson to insert a conversation between them on the tape for January 8 that would explain the presence of the beer cans in the Command Center. For this purpose Henkes called Wilson and said that he had found five beer cans on the DFC of which four were empty so there wasn't enough beer to have a party. The call was made while the primary tape for January 9 was turned off (thus starting the secondary tape) and was recorded in an open space on the January 8 tape. The January 9 primary tape was turned off a total of seventy-six minutes between 1:49 a.m. and 3:08 a.m. The spurious conversation appeared on the January 8 tape between normal entries made at 2:43 a.m. and 2:48 a.m., however, the recorder's automatic equipment recorded it as having been received at 1:49 a.m. on January 9. The January 9 tape entries were in order and showed that Sergeant Henkes called Wilson at 1:49 a.m. and reported finding the beer and empty cans.

On January 25, Joan Christopher, Protective Specialist, was told to gather data relevant to consolidating the DFC communications facilities with similar facilities in Salt Lake City, Utah and particularly the amount of time telephone lines were in use between the two centers. She began monitoring the tape for January 16 and heard a conversation during Shift 3 commenting on

events of the previous weekend. She then monitored the tape for January 8 and heard numerous procedural errors, a reference to drinking, a conversation between Grievant Rogers and Sergeant Henkes and a conversation in which Henkes said that he had found some empty beer cans which he had brought to the Command center. Christopher noted on the January 8 tape that the entries were not in chronological order—because of the insertion of Sergeant Henkes' call to Wilson on January 9—and was satisfied that the tape had been edited. She then removed all of the tapes from the Command Center except the two then in use and kept them in protective custody. She and her supervisors then audited several tapes and found what appeared to be evidence of many irregularities and it was decided to refer the matter to the Office of The Inspector General of the General Services Administration. (The IG Office is an independent investigative arm of GSA and as such is not subject to supervision by Regional officials. On February 2 the Director, Federal Protective Services Division of the Agency addressed a request to the Office of the IG seeking an investigation of activities within the Command Center. Special Agents Richard Morse and Robert Ellingson of the IG's Office assumed custody of the tapes and began an investigation.

On February 3, Morse and Ellingson went to Grievant Rogers' home in Aurora and, after advising him that he was to be interrogated concerning a matter that might involve criminal misconduct and that he should consider the interrogation "non-custodial", he accompanied them to the local police station where the interview took place. The Special Agents made copious notes of the interview which were later used to prepare

a typed Memorandum of Interview. Rogers was not advised that he could have a representative present nor did he request one and he was not asked to sign or approve the special agent's notes.

On February 8, Morse and Ellingson interviewed Grievant Wilson at the DFC in exactly the same manner as for Rogers. As with Rogers, Wilson was not advised that he could have a representative present, he did not request that one be present and he was not asked to sign or approve the special agent's notes.

On February 4, Morse and Ellingson interviewed a number of Federal Protective Officers without advance notice when they reported for work at 10:00 p.m. To avoid having the interviewed employees disclose the matters discussed in the interviews with those who had not yet been interviewed, they instructed the employees not to discuss the interviews with any other person. To some employees this meant that they could not discuss them with their wives and to another it meant that they could not discuss them with a Union representative. Morse and Ellingson assumed that the employees understood that after all employees had been interviewed the restriction would end but the employees were not so advised. None of the employees were advised before the interview that they were entitled to have a representative present and apparently none of them requested representation. On February 5, the Union filed an unfair labor practice charge with the Federal Labor Relations Authority based upon the imposition of an illegal "gag" rule by the special agents and, in the normal course of business, the Agency was probably informed of the charge on February 6. In the weeks that followed the special agents continued their

investigation. On or about February 8, Morse submitted a report of his findings as to Grievant Wilson and possibly Sergeant Henkes and Grievant Rogers to the United States Attorney for consideration of criminal prosecution and was advised that the Department of Justice would not prosecute because it favored disposition by Agency administrative action with the proviso that in the event that administrative disposition "did not fit the crime" further consideration would be given to criminal prosecution. It was conceded herein that the threat of criminal prosecution still hangs over the Grievants.

On March 2, the special agents again interviewed the Grievants separately and asked them to sign affidavits prepared from the agent's notes of the earlier interviews. The affidavits contain numerous handwritten corrections of the typed text, each page and each correction is initialled by the affiant and the final page signed under oath administered by Morse and witnessed by Ellingson. As before, the Grievants were not offered an opportunity to have a representative present nor did they request representation.

On April 2, both Grievants were formally advised that the Agency proposed to remove them from the Federal service. On May 3, each responded in writing denying all of the charges made against them and demanding withdrawal of the charges because of denial of their right to representation during the interviews. On May 21, Grievant Wilson was informed that two of the charges against him (No. 1: alleging falsification of and conspiracy to falsify official government reports and tape recordings; and, No. 2: the deliberate attempt to prevent the recording of actual activities and to conceal

activities which should have been a matter of record) had been sustained and that he would be removed from his position on or about July 12, 1982.

On May 26, Grievant Rogers was informed that three charges against him had been sustained: Charge No. 1: alleged falsification of and conspiring to falsify government records; Charge No. 2: failure to report suspected irregularities; and Charge No. 3: use of a government-owned vehicle for other than official purposes.

POSITIONS OF THE PARTIES

THE AGENCY: The Grievants participated in the editing and alteration of official documents, the tapes for January 8 and 9, and removal from government service is the appropriate penalty established by the General Services Administration Administrative Manual. Article XXVII, Section 2, of the contract between the parties has been superseded by the same article of Supplement #1 to the contract which makes Section 7114(A)(2)(b) of the Civil Service Reform Act applicable so that employees are entitled to representation at disciplinary interviews only upon their request. The requirement of Article XXVII, Section 2, of the contract that employees must be offered representation before each such interview does not apply because the Agency has met the requirements of the statute for notice to the employees of those rights. The Agency could not take action on the violations which first came to its attention on January 25 or 26 until after completion of the Special Agent's investigation on March 3. The actions against the Grievants were taken within forty days of March 3 and met the time limits of the contract. In any event, the arbitrator should take into consideration the

present limitations of staff under which the Agency must operate, the fact that participation by the Grievants in the investigation was entirely voluntary and, if there was delay in completing the investigation, there is no evidence of irreparable harm to the Grievants thereby and no penalty is provided for exceeding the contractual time limits. The so-called "gag order" of the Special Agents was not a decision of the Agency but of the Office of the Inspector General, an independent arm of the agency.

THE UNION: Article XXVII, Section 2, of the contract requires that each employee be given an opportunity to have a representative present at interviews for disciplinary purposes. The requirements of the Civil Service Reform Act do not negate the stronger contract provisions negotiated by the parties. The referenced contract provision did not expire upon execution of Supplement #1 but remains in effect as another arbitrator has found in a matter between these same parties and that decision should be considered dispositive of the issue. The Grievant's affidavits were secured illegally because of the lack of opportunity for representation, they have been repudiated by the Grievants because they were secured in violation of the contract and there is no necessity for the arbitrator to address the issue of possible merit in the charges made against the Grievants because of the Agency's procedural errors. The "gag order" of the Special Agents further deprived the employees of their right to Union representation. The Grievants should be reinstated and made whole for any losses suffered by reason of their unjust removal from government service.

DECISION

The Union chose not to have the Grievants testify herein and they were not present during the hearing although they were admittedly ready, able and willing to testify if so instructed by the Union. The Agency did not call the Grievants as adverse witnesses nor did it call Sergeant Henkes, a supervisor. The Union did not address the merit of the charges against the Grievants because of its belief that the Agency's procedural errors tainted the entire investigation so that none of the evidence obtained from the Grievants may be used against them and in any event, the Command Center tapes constitute hear-say evidence which should not be considered. Because of the Union's position there is no dispute as to the acts of the Grievants upon which the charges against them are based. There is no doubt that the Agency established a *prima facie* case against the Grievants which the Union had an obligation to refute but failed to do.

The arbitrator does not agree that the evidence on the tapes is necessarily hearsay. The testimony of Morse and Christopher as to the recorded statements of the Grievants heard by them would not appear to be hearsay. (The Union stipulated that the voices of the Grievants on the tapes were correctly identified by Christopher and other Agency witnesses.) The testimony of Morse and Christopher as to the recorded statements of Sergeant Henkes implicating the Grievants in prohibited activity are clearly hearsay because Henkes was not available for cross examination. Despite these considerations the arbitrator has chosen to rely only upon the affidavits of the Grievants given

to the Special Agents. These affidavits are mutually corroborative and are admissions by the Grievants against their own interests. Morse, to whom they were made, testified and was cross-examined by counsel for the Union on other matters.

The affidavit of Grievant Wilson established that he used foul language on the tapes, language which suggested that he had engaged in or was going to engage in homosexual activity with another officer; that he prevented the recording of normal activity on January 9; and that he and Sergeant Henkes inserted their January 9 conversation on the tape for January 8.

The affidavit of Grievant Rogers establishes that, as suggested by Sergeant Henkes, he used a government vehicle to pick up beer at his home and deliver it to Henkes at the DFC; that he saw empty champagne bottles in the Command Center and did not report it; that he drank beer on several occasions while on duty; that he was asked by Grievant Wilson to help edit the tapes for January 8 and 9 by inserting a conversation on January 9 on the tape for January 8; that he refused to take part in the editing; that he asked Wilson to delete from the January 9 tape any reference to his conversation with Wilson regarding alteration of the January 8 tape.

Accordingly, it is found that Grievants committed the acts enumerated in the two preceding paragraphs and thereby substantiated charges made against them sufficient under normal circumstances to justify their removal from government service.

It is clear that the substance of the Grievant's affidavits originated in the interviews that preceded them by approximately thirty days. There is no doubt that before the interviews the Grievants were not given an opportunity to have a representative present as required by Article XXVII, Section 2, of the collective bargaining agreement. Whether the cited article of the contract prevails or whether the corresponding Article of Supplement #1 superseded it was decided by Arbitrator David Goodman on February 16, 1981 in the matter of the suspension of Harold Watts (AAA Case No. 71 39 0422 80) between these same parties. At Page 15 of the slip decision Arbitrator Goodman stated:

> "A comparison of the language of the statute with the language of Section 2 [of the contract] shows that Section 2 affords greater protection to the employee then does the statute. Unlike the statute, which requires a request for representation, Section 2 places no such requirement upon the employee. Thus, in the former the onus is upon the employee, whereas in the latter the onus is upon the employer. Additionally, unlike the statute, 5 USC 7114(a)(3), which says that employees shall be informed of these rights on an annual basis, an interpretation of Section 2 shows that an advisement of the employee's right to representation *must* occur whenever disciplinary action may result."

As in the Watts case, supra, the record here is void of any indication that Grievants requested the presence of a representative during the course of the investigation. Furthermore, Special Agent Morse testified that neither he nor Special Agent Ellingson advised any employee of his right to representation. Therefore, their statutory right was not violated. The Agency established compliance with the notice requirement of the statute which was not challenged by the Union. In agreement with Arbitrator Goodman, it is found that

the Agency did not give the Grievants an opportunity to have a representative present during the investigation as required by Article XXVII, Section 2, of the contract.

The Union asserts that because of the Agency's procedural errors the affidavits which resulted from the Special Agent's interviews must be found invalid and of no effect. Whether or not this course should be followed depends upon consideration of all of the facts. As Federal Protective Officers the Grievants were responsible for enforcing Federal laws and regulations on Government-owned and leased property for the protection of persons or property under the jurisdiction of the Federal government. Some basic fundamental knowledge of the law is a necessary part of the job because they are a personification of the legal authority vested in the Federal Protective Service. It is thus unrealistic to pretend that the Grievants did not know that they were violating the law or that they were entirely unaware of their right to representation during an investigative interview. Neither Rogers or the Union had advance notice of his interview on February 2 but when Wilson was interviewed on February 8 the Union knew of the investigation and that it focused on the employees on Shift 3. Most of the employees were interviewed when they reported for work on February 4 and were instructed by the Special Agents not to discuss the interviews with anyone. This action caused the Union to file an unfair labor practice charge against the Agency on February 5. There is no indication that the Union protested to the Agency before doing so in an effort to avoid interference with the rights of the employees to representation at the interviews. The conditions on February 8 when

Grievant Wilson was interviewed were obviously quite different than when Rogers was interviewed and there is even greater reason to believe that he was aware of his right to representation and chose not to exercise it.

The Grievants are not considered by the arbitrator to be bound by their statements to the Special Agents during the interviews in February but solely by the contents of their affidavits which were given on March 2. Each of them had over three weeks to contemplate the information they had provided and to discuss with the Union the course to pursue. On March 2 each was told that he was not required to sign the affidavit and after carefully considering the contents and making substantial changes therein, each signed his affidavit as his voluntary act and must be considered bound by the result. The Grievants were familiar with the ordinary technicalities of the law; they knew that they could not be hurried into the execution of an affidavit without having an opportunity to give it full consideration. The facts indicate that they did consider the affidavit carefully before executing it.

The foregoing should not be construed as an apologia for the Agency's failure to provide the Grievants with the due process rights guaranteed them by the agreement. Where, as here, a procedural irregularity may not have been prejudicial, the emphasis upon technicalities would be inconsistent with the informal atmosphere of the arbitration process and the end result could be quite ludicrous. For example, here, Grievant Wilson has demonstrated that he is unworthy of the Agency's continued trust and confidence. To allow him to continue as an employee with access to the tape recorder, source of the most basic and essential security record of

the Protective Service, on the sole ground that his removal was in violation of a contractual requirement, would be to elevate form above substance. A better approach recognizes that procedural requirements are important and that any failure to comply will be penalized, but will not thereby render the action void. This approach has been taken by most arbitrators and will most likely assure the Agency's making certain that the contract is followed in the future. Had the Grievants made incriminating statements while *being denied* union representation in the investigatory interview, the arbitrator might properly exclude such evidence.

The Union argues that under Article XXVII, Section 3, of Supplement #1 the Agency was required to serve its notice of proposed adverse action within a reasonable period of time (normally forty calendar days) after the alleged offense became known to management. The Union contends that the offense became known to the Agency on February 2 when it filed its request for an investigation by the Office of the Inspector General and that service of the notice was, therefore, due on or about March 15. The Agency asserts that progress on the investigation was not within its control since the Office of the Inspector General is an independent agency; that it lacked specific knowledge of the facts until it received the Special Agents' report on March 3; that the time period should not start running until March 3 and that issuance of the notice of adverse action May 3 met the alternative requirement of "a reasonable period of time" specified in Section 3. The arbitrator is in substantial agreement with the position of the Union. The Agency was aware of the alleged offenses on February 2 when John B. Osborne, Director, Federal Protective

Service Division, requested the Office of the Inspector General investigation, stating, "To date we have sufficient information to support strong disciplinary action for procedural irregularities and acts of official misconduct." Whether the investigation was made by Agency personnel or by the Office of the Inspector General the time limit of Section 3 began running on that date. Referring to the OIG could not possibly result in an automatic extension of the contractual time limit without the Union's acquiesence. Whether or not issuance of the notice of adverse action on May 3, 88 days later, was within a reasonable period of time is a matter for conjecture. Certainly the investigation was extensive and far-reaching but only 29 days was required for its completion on March 3 with delivery of the Special Agent's report. Thereafter 57 days was consumed by consideration of the Report and decision on the proposed discipline. By no means can this be considered a reasonable period of time and the Agency thereby violated Section 3 of Article XXVII of Supplement #1. I note that Section 3, Paragraph 110(c) of the GSA Administrative Manual (Agency Exhibit 13) on Page 181 states:

> "When a report of investigation is received from the Office of the Inspector General, it should receive especially high priority attention. Normally, if disciplinary action is appropriate, it should be proposed and taken within 30 calendar days after receiving the report."

The Union has not claimed or attempted to show that the interests of the Grievants were in any way prejudiced by the inordinate delay in issuance of the notice of adverse action and I am not aware that arbitrators generally have penalized an employer for such procedural

violations in the absence of some adverse effect upon the grievants. The Union asserted that Article 33, Section 9(A)(4) of the current National Agreement required the Agency to provide Grievant Rogers with a written decision within twenty days following his response on May 3 to the notice of adverse action. The response of the Agency was dated May 26 and so exceeded the time limit by three days. However, the National Agreement became effective on May 5—two days after Grievant Rogers' response—and so did not apply to the Agency's reply. The Agency's failure to comply with the time limits of the agreement, and with its own administrative guidelines for disposition of grievances, lends credence to the Union's complaints during the hearing that the Agency's failure to promptly supply requested information interfered with its preparations for the hearing and resulted in the filing of additional unfair labor practice charges.

Solely because of the Agency's pervasive failure to comply with the due process requirements of the agreement, the removal of the Grievants from government service was not for just cause. Grievant Wilson must be reinstated to a position in the Federal Protective Service that he can reasonably be expected to perform satisfactorily and the remedy must provide protection to the Agency from further exposure to Grievant's demonstrated proclivity to tamper with the tape recording system. In deciding upon the position to which Grievant Wilson should be reinstated, the rights of other employees must be considered and, to insure that these rights are not violated, the Agency may reinstate him to any non-clerical position within the Federal Protective Service at Denver, Colorado, including the entrance po-

sition. In addition Grievant Wilson shall serve a two-week suspension without pay.

Grievant Rogers' removal from government service will be reduced to a two-week suspension without pay followed by reinstatement to the position held by him on the date of this Decision and Award.

It is the arbitrator's understanding that removal of the Grievants from government service was not to take place until five days after conclusion of this expedited arbitration. In that event the two-week suspension without pay imposed upon each of them shall begin upon conclusion of this proceeding.

AWARD

1. The removal of the Grievants from government service was not for just cause.

2. The removal from government service of each of the Grievants shall be reduced to a disciplinary suspension of not less than two weeks without pay.

3. Upon completion of the suspension Grievant Wilson shall be immediately reinstated to a position within the Federal Protective Service at Denver, Colorado, to be determined by the Agency.

4. Upon completion of the suspension Grievant Rogers shall be immediately reinstated to the position held by him on the date of this Decision and Award.

/s/ Allison E. Nutt

ALLISON E. NUTT,
Arbitrator

APPENDIX D

In the Matter of Arbitration between

GENERAL SERVICES ADMINISTRATION, REGION 8. (UNITED STATES GOVERNMENT), EMPLOYER,

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL UNION NO. 3275, UNION,

Concerning the Discharges of

THOMAS F. ROGERS AND ROBERT WILSON, JR., GRIEVANTS.

JULY 31, 1982

REVISED AWARD OF ALLISON E. NUTT

By letter dated July 23, 1982, The Union requested clarification of Paragraph 2 of the Award herein which issued July 16, 1982, and the Employer was informed of the request by letter from the arbitrator dated July 24, 1982. The Union correctly points out that Paragraph 2 is inconsistent with the Decision which limited the discipline to two weeks suspension without pay. On Page 10 of the Decision, the first paragraph states "In addition Grievant Wilson shall serve a two-week suspension without pay."; the second paragraph provides that "Rogers' removal from government service will be reduced to a two-week suspension without pay.."; and the third paragraph refers to ". the two-week suspension without pay imposed on each of them..".

It is abundantly clear that the intent of the Decision was to impose a two-week suspension without pay on each of the Grievants, that the Award in Paragraph 2 is incorrect as issued and that inclusion of the phrase "not less than" was inadvertent and contrary to the arbitrator's intention and should be deleted.

Accordingly, Paragraph 2 of the Award issued July 16, 1982, is hereby revised to read as follows:

> "2. The removal from government service of each of the Grievants shall be reduced to a disciplinary suspension of two weeks without pay."

/S/ Allison E. Nutt

ALLISON E. NUTT,
Arbitrator

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 83-589

DONALD J. DEVINE, PETITIONER,

v.

ALLISON E. NUTT, ET AL., RESPONDENTS.

DATED SEPTEMBER 22, 1983

JUDGMENT

ON APPEAL from the Office of Personnel Management *This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:* AFFIRMED AS MODIFIED.

ENTERED BY ORDER OF THE COURT

GEORGE E. HUTCHINSON, *Clerk*
/s/ George E. Hutchinson
Clerk

Respondent's Petition for
Rehearing, Denied,
November 18, 1983,
Respondent's Suggestion for
Rehearing en banc, Declined
November 18, 1983.

ISSUED AS A MANDATE: November 28, 1983
COSTS: Against Petitioners.
Printing .. $48.32
Total $48.32

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 83-589

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER,

v.

ALLISON E. NUTT, ARBITRATOR, AND
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 3275, RESPONDENTS.

NOVEMBER 18, 1983

ORDER

A petition for rehearing and a suggestion for rehearing en banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing en banc is declined.

FOR THE COURT:

/s/ George E. Hutchinson
GEORGE E. HUTCHINSON,
Clerk

RESPONDENT'S

BRIEF

Office-Supreme Court, U.S.
FILED
JUN 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

v.

ALLISON E. NUTT, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES A. HOBBIE *
Staff Counsel

MARK D. ROTH
Acting General Counsel
American Federation of
Government Employees,
AFL-CIO
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in federal sector adverse action proceedings that are brought to arbitration pursuant to 5 U.S.C. 7121(e), an arbitrator may properly take into account in making the ultimate award violations of the governing collective bargaining agreement which are raised by the union on its own behalf as a party to the arbitration?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT	3
ARGUMENT	11
CONCLUSION	26

TABLE OF AUTHORITIES

CASES:

Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority, —— U.S. ——, 104 S. Ct. 439 (1983) 14, 21

Department of Defense, Army Air Force Exchange Service v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945, 102 S.Ct. 1443 (1982) 15, 17, 21

Devine v. Brisco, No. 83-1110 (Fed. Cir., April 27, 1984) 12, 13, 16, 17, 25

Devine v. Goodstein, 680 F.2d 243 (D.C. Cir. 1982) 5

Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1984) 5, 18, 25

Devine v. White, 697 F.2d 421 (D.C. Cir. 1983) 5, 7, 8, 12, 13, 15, 16, 17, 18, 20

Local 2578, AFGE v. GSA, 711 F.2d 261 (D.C. Cir. 1983) 18

Otherson v. Immigration & Naturalization Service, 711 F.2d 267 (D.C. Cir. 1983) 18

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 923 (1957) 12, 18

TABLE OF AUTHORITIES—Continued

	Page
United Steelworkers v. Am. Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343 (1960)	18
United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358 (1960)	12, 20
United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347 (1960)	17
Veterans Administration v. Federal Labor Relations Authority, 675 F.2d 260 (11th Cir. 1982)	18
ADMINISTRATIVE CASES:	
Internal Revenue Service and National Treasury Employees Union, 3 FLRA 479 (1980)	22
Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, 4 FLRA 686 (1960)	22
STATUTES AND REGULATIONS:	
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111	2, 5
5 U.S.C. 4303(e)	5
5 U.S.C. 7101(a)	13, 14, 15, 20
5 U.S.C. 7101(b)	24
5 U.S.C. 7106(b)	13
5 U.S.C. 7116	21
5 U.S.C. 7116(d)	22, 24
5 U.S.C. 7118	21
5 U.S.C. 7121(a)(1)	14
5 U.S.C. 7121(a)(2)	18
5 U.S.C. 7121(b)(3)(A)	21
5 U.S.C. 7121(b)(3)(C)	5, 20
5 U.S.C. 7121(e)	24
5 U.S.C. 7121(e)(1)	5, 21
5 U.S.C. 7121(e)(2)	9, 16
5 U.S.C. 7121(f)	6, 16
5 U.S.C. 7513(d)	5
5 U.S.C. 7701(c)(2)	13
5 U.S.C. 7701(c)(2)(A)	8
5 U.S.C. 7703(d)	6

TABLE OF AUTHORITIES—Continued

	Page
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25	12
28 U.S.C. 1254(1)	2, 26
31 U.S.C. 1349(b)	8
MISCELLANEOUS:	
Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231 (1977)	19
Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427 (1969)	19
H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 157 (1978)	16
Robins, *The Presidential Address: Threats to Arbitration*, in ARBITRATION ISSUES FOR THE 1980s, PROCEEDINGS OF THE 34TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1 (J. Stern & B. Dennis eds. 1982)	19
S. Rep. No. 95-969, 95th Cong., 2d Sess. 107 & 111 (1978)	16, 24
S. Rep. No. 97-275, 97th Cong., 1st Sess. 3 (1981), *reprinted in* 1982 U.S. Code Cong. & Ad. News 11	12, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1673

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

v.

ALLISON E. NUTT, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 718 F.2d 1048. The order of the court of appeals denying respondents' motion to dismiss (Pet. App. 17a-20a) is not reported. The arbitration decision and award of respondent Nutt (Pet. App. 21a-39a) and his revised award (Pet. App. 40a-41a) also are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a) was entered on September 22, 1983. A petition for rehearing was denied on November 18, 1983 (Pet. App. 43a). After an extension of time for filing a petition for a writ of certiorari had been granted by the Court to

and including April 16, 1984, the petition for a writ of certiorari was filed on April 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111, and 5 C.F.R. 1201.56(c)(3) are set forth at Pet. 2. Additionally, 5 U.S.C. 7121 provides in pertinent part:

> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.
>
> • • • •
>
> (b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—
>
> . . . (3) include procedures that—
>
> (A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;
>
> (B) assure such an employee the right to present a grievance in the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and
>
> (C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

STATEMENT

The petitioned-from decision and arbitration award address the removals for misconduct of two Federal Protective Service (FPS) officers—Thomas Rogers and Robert Wilson, Jr. (the grievants)—employed by the General Services Administration (GSA or the Agency) at the Denver Federal Center, Denver, Colorado (Pet. App. 2a, 23a). American Federation of Government Employees, AFL-CIO, Local 3275 (AFGE or the union), as the exclusive representative of GSA and FPS employees at the Denver Center, invoked arbitration on behalf of the officer-grievants pursuant to the collective bargaining agreement between GSA and AFGE, and to 5 U.S.C. 7121(b)(3)(C) (*id.* at 4a, 21a).

Grievant Rogers was removed on charges of falsification of records, failure to report irregularities, and use of a government vehicle for non-official purposes (*id.* at 4a, 29a). Grievant Wilson was removed for falsification of tape recordings and attempting to conceal activities of record (*id.* at 4a, 28a-29a).

The charges were based on a sequence of incidents commencing on January 2, 1982, when Rogers was requested by his supervisor to pick up several cans of beer while on patrol in an official government vehicle. Rogers drove to his nearby home, picked up several cans of beer, and delivered the beer to his supervisor at the FPS command center. The supervisor later drank the beer and left the empty cans at the center when he went off duty (*id.* at 2a-3a, 24a-25a). Concerned that the unexplained presence of empty beer cans might lead to discovery of his drinking beer on duty, the supervisor subsequently telephoned Wilson, who was then on duty at the command post, and instructed him to alter the tapes which monitor communications between the post and patroling FPS officers to include a false accounting for the empty cans (*id.* at 3a, 25a). Wilson complied with the request (*id.*).

Upon discovery of irregularities in the tapes by an FPS official on January 25, 1982, special agents of the GSA initiated an investigation (*id.* at 3a, 26a). Two agents confronted Rogers at his home and, after advising him that he was to be interrogated concerning a matter that might involve criminal misconduct and that he should consider the interrogation "non-custodial," interviewed Rogers at a local police station, taking copious notes (*id.* at 3a, 26a). Rogers was not informed that he was entitled to have a union representative present at the interview.[1]

The same agents subsequently interviewed Wilson in an identical fashion (*id.* at 3a-4a, 27a). As with Rogers, Wilson was not advised that he could have a representative present (*id.*).

On March 2, 1982, the agents again interviewed the grievants separately and asked them to sign affidavits prepared from the agents' notes of the earlier interviews. The grievants signed the affidavits as requested (*id.* at 4a, 28a). As before, the grievants were not alerted to their right to union representation as specified in the collective bargaining agreement (*id.*).

The grievants were formally notified on April 2, 1982, nearly three months after the alleged misconduct, that GSA proposed to remove them (*id.*). After receiving the grievants' written responses to the charges, GSA issued a removal notice to each grievant in May, 1982, which was effective on or about July 12, 1982 (*id.* at 4a, 28a-29a).

---

[1] Article XXVII, Section 2 of the collective bargaining agreement between GSA and the grievants' union provides (*id.* at 3a n.2, 22a):

> The Employer agrees that during formal discussion where interrogation or written or sworn statements are taken from an employee, in connection with a charge that may result in disciplinary action against him, he will have the opportunity to have a representative present. It should be understood that counseling sessions are not formal discussions.

2. The Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111 (CSRA), entitles competitive service or so-called preference eligible federal employees who are subject to "adverse agency action"—including removal—to appeal to the Merit Systems Protection Board (MSPB). See 5 U.S.C. 4303(e) and 7513(d). Additionally, *any* employee who is a member of a bargaining unit may challenge adverse agency action through the applicable grievance and arbitration procedures of the collective bargaining agreement between his union and employer. See 5 U.S.C. 7121(e)(1), and see *Devine v. Goodstein*, 680 F.2d 243, 245 (D.C. Cir. 1982); *Devine v. White*, 697 F.2d 421, 428 (D.C. Cir. 1983); and *Devine v. Sutermeister*, 724 F.2d 1558, 1560 (Fed. Cir. 1984).

In the case at hand both officers opted to challenge their removals through the grievance procedures of the collective bargaining agreement between GSA and AFGE. AFGE invoked arbitration pursuant to 5 U.S.C. 7121(b)(3)(C).

The arbitrator (respondent Nutt) found that the grievants had committed the alleged acts of wrongdoing (*id.* at 4a, 32a).[2] Arbitrator Nutt concluded, however, that "the Agency did not give the Grievants an opportunity to have a [union] representative present during the investigation," as required by Article XXVII, Section 2 of the collective bargaining agreement (*id.* at 4a, 34a).[3]

The arbitrator also agreed with the union's contention that the agency had violated Article XXVII, Section 3 of a supplement to the collective bargaining agreement by permitting an unreasonable period of time to elapse between the date when the agency first learned of the sub-

---

[2] AFGE did not contest the facts before the arbitrator upon which the discipline was founded.

[3] Article XXVII, Section 2 of the agreement is quoted, *supra*, p. 4, note 1.

ject misconduct and the issuance of the notices of proposed removal (*id.* at 4a-5a, 37a).[4]

Although the arbitrator found that the union did not claim or demonstrate any prejudice *to the grievants* due to this "inordinate" delay (*id.*), with respect to this clear contractual violation and to the "Agency's failure to provide the Grievants with the due process rights [of union representation] guaranteed them by the agreement" he ruled "that procedural requirements are important and that any failure to comply will be penalized, but will not thereby render the action void. This approach . . . will most likely assure the Agency's making certain that the contract is followed in the future" (*id.* at 36a). Arbitrator Nutt concluded that "[s]olely because of the agency's pervasive failure to comply with the due process requirements of the agreement, the removal of the Grievants from government service was not for just cause" (*id.* at 5a, 38a). As a consequence, the penalties imposed on the grievants were reduced by arbitrator Nutt from removal to two weeks' suspension without pay (*id.* at 5a, 38a-39a).

3. The Director of the Office of Personnel Management sought review of the arbitrator's decision by the United States Court of Appeals for the Federal Circuit, under 5 U.S.C. 7703(d) and 7121(f).[5] The court of appeals granted the petition for review, and a five-judge panel issued the unanimous decision which is the subject of the petition at bar (*id.* at 1a-16a).[6]

The court of appeals affirmed arbitrator Nutt's decision and award of a two-week suspension without pay with respect to grievant Wilson, holding that this award is entitled to finality and should be affirmed because it is consistent with law and draws its essence from the collective bargaining agreement (*id.* at 13a). Concerning the award to grievant Rogers, the court of appeals held that the arbitrator erred as a matter of law in mitigating

---

[4] That section provides, in pertinent part (*id.* at 5a n.4, 23a):

> PROPOSED NOTICE: In the event an employee is issued a notice of proposed disciplinary or adverse action, that employee must be afforded and made aware of all his/her rights. These proposed notices shall be served on the employee(s) within a reasonable period of time (normally 40 calendar days) after the occurrence of the alleged offense or when the alleged offense becomes known to management.

[5] 5 U.S.C. 7703(d), which is applicable to awards of arbitrators involving adverse actions by operation of 5 U.S.C. 7121(f), reads in pertinent part (*id.* at 1a-2a n.1):

> (d) The Director of the Office of Personnel Management [OPM] may obtain review of any final order or decision of the [Merit Systems Protection] Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

[6] In this case respondent AFGE moved for dismissal prior to the commencement of briefing on the ground that the Director's petition was untimely. In its order of April 12, 1983 (*id.* at 17a-20a), a three-judge panel of the court of appeals denied the motion and ruled in this case that the Director of OPM must seek reconsideration of an arbitrator's award before petitioning for judicial review (*id.* at 20a). Primarily because this order directly conflicted with the conclusion of the U.S. Court of Appeals for the District of Columbia Circuit in *White*, *supra*, 697 F.2d at 433, AFGE suggested that a hearing en banc might be appropriate. The court of appeals denied the suggestion except to the extent that the case was heard by a five-judge panel. See June 24, 1983 letter from George E. Hutchinson, Clerk of the United States Court of Appeals for the Federal Circuit, to Charles A. Hobbie, Staff Counsel, AFGE.

grievant Rogers' removal to a two-week suspension in disregard of the one month suspension commanded by 31 U.S.C. 1349(b) (*id.* at 15a-16a). The court of appeals modified the award, with respect to Rogers, to a one-month suspension without pay, in accordance with 31 U.S.C. 1349(b) (*id.* at 16a).

Addressing the issue of the award's consistency with external law and regulations which was raised by the OPM Director's petition, the court of appeals specifically answered the question of whether and to what extent the "harmful error" standard—required by statute to be applied in MSPB review of agency action (*see* 5 U.S.C. 7701(c)(2)(A) (Pet. 2)—must be employed in adverse action arbitration. The court of appeals agreed with the only other court of appeals which has addressed this question (see generally *White, supra*), holding that:

> (1) arbitrators should take account of "harmful error" in deciding whether a grievant was personally prejudiced, but
>
> (2) there can be violations of the collective bargaining agreement, not prejudicial to the particular grievant, that the union may raise on its own behalf in the grievance proceeding and which are to be taken into account in making the ultimate award, and
>
> (3) in this case there were such violations which the arbitrator properly took into account . . . even though those violations were not personally prejudicial to grievants Rogers and Wilson.

Pet. App. 10a.

In reaching the above holdings, the court of appeals first noted its agreement with its sister circuit in *White*, *supra*, 697 F.2d at 441, that:

> "harmful error" applies to determining whether the particular grievant has been prejudiced (even though we also think, as discussed below, that an arbitral award can nevertheless be based on collective bargaining violations important to the union but not prejudicial to the individual grievant).
>
> Because the "harmful error" provision can appropriately be regarded as part of the "standard of proof" (if not of the burden of proof itself) with respect to the individual grievant, it is proper to hold the arbitrator to the rule insofar as he decides the particular instance of the individual grievant.[12]

[12] Though section 7121(e)(2) of the Reform Act (Title 5, U.S. Code), *supra*, specifically incorporates only section 7701(c)(1), *supra*, the latter is made "Subject to paragraph 2 of this subsection" (i.e., section 7701(c)(2), the "harmful error" provision) and can therefore be read, in view of the legislative history, as likewise incorporating section 7701(c)(2).

Pet. App. 11a-12a.

The court continued by determining the proper impact on an award of an agency's violations of significant contractual rights which may not have prejudiced the individual grievants:

> [L]ike the *White* court, *supra*, 697 F.2d at 443, *see id.* at 446 (Bork, J., concurring), we also hold that the arbitrator can take account of significant violations of the collective bargaining agreement, important to the union, even though the particular grievants may not have been themselves adversely affected. The union is a major (if not *the* major) party to the arbitration and its proper interests are to be protected, even though the interests of the particular grievants may not, alone, call for protection. Congress so recognized the role of unions and collective bargaining agreements. The Reform Act expressly provides that management prerogatives shall not "preclude any agency and any labor organization from negotiating . . . procedures which management officials of the agency will observe in exercising [their] authority" to discipline and remove em-

ployees. 5 U.S.C. section 7106(b) (1982). In the contract here, the union and the agency agreed to institute procedures that provide employees with union representation at investigatory interviews and timely notice of proposed adverse action within a reasonable period after the offense or its discovery. These procedural safeguards, established by collective agreement, effectively become union rights.

In the Reform Act, Congress also expressly provided that, in adverse action cases of this type, a "collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability" (5 U.S.C. section 7121(a)(1) (1982)), and recognized that, in matters of this kind raised under the negotiated grievance procedure, the union should be the representative and there should be binding arbitration (if necessary). 5 U.S.C. section 7121(b)(2)(b) [sic] (1982). We think this statutory scheme means that important union rights are also to be enforced in the negotiated grievance procedure.

Id. at 12a-13a.

Specifically applying these principles to the award before it, the court of appeals noted the arbitrator's finding of a "pervasive failure to comply with the due process requirements of the agreement" (*id.* at 13a-14a) and arbitrator Nutt's opinion that such a "pervasive failure" justified mitigation (*id.*). In this regard, the court of appeals concluded, the award did not controvert any civil service law or regulation (*id.* at 14a). The court explained, furthermore, that:

> [T]he presence in the contract of these procedural safeguards concerning representation and notice is evidence of their substantiality and importance to the union and its members covered by the agreement. *See White*, *supra*, 697 F.2d at 443. They also appear, of themselves, to be significant measures for the union and its members. Viewed in this light, the arbitrator's decision to uphold and enforce the vitality of these provisions by, in effect, penalizing the agency for disregarding them was reasonable and within the scope of his authority. *See Enterprise Wheel & Car Corp.*, *supra*, 363 U.S. at 597. Violations of explicit and important procedural rights contained in a contract, such as these, could fairly be said to be tantamount to "harmful error" to the union within the scope of 5 U.S.C. section 7701(c)(2)(A) (1982) for the purposes of collective bargaining arbitration to which the union is a proper party. *See White*, *supra*, 697 F.2d at 443; *id.* at 446. (Bork, J., concurring). For that reason, we cannot disturb the award as to Wilson.

Id. The arbitrator's mitigation of the grievants' penalties was sustained, accordingly, except to the extent that Rogers' penalty conflicted with statutory authority, as previously noted.

ARGUMENT

Petitioner contends that the petitioned-from decision "eviscerates" the statutorily prescribed "harmful error" rule in the context of arbitral review of adverse agency action (Pet. 9) and thereby creates a standard for arbitral review of adverse agency action which is different from the standard applied by the Merit Systems Protection Board (*id.* at 10). The future consequences of this ruling, petitioner hypothesizes, will be "forum shopping" by bargaining unit employees (*id.*) and "the entirely disparate treatment of the two halves of the federal workforce" (*id.*), both of which are contrary to the intent of the Civil Service Reform Act.

The only two courts of appeals which have entertained petitioner's contentions—the three-judge D.C. Circuit panel in *Devine v. White*, *supra*, and the five-judge panel herein—have soundly and unanimously rejected these contentions, concluding essentially that the harmful error rule, while clearly applicable to arbitral proceedings, is

not limited in applicability in the arbitration context to situations where the grievants are demonstrably prejudiced but extends to instances where a union can show violations tantamount to harmful error to itself. *See White, supra*, 697 F.2d at 443; *id.* at 446 (Bork, J., concurring); and *Devine v. Brisco*, No. 83-1110, slip op. at 11 (Fed. Cir., April 27, 1984) (App., *infra*, 10a), citing *Nutt, supra*, 718 F.2d at 1055 (Pet. App. 14a). This conclusion, which is correct, does not conflict with the decision of any other court of appeals or with any decision of this Court. Furthermore, in contrast to petitioner's position, it is entirely consistent with the long-standing, important federal policy favoring arbitration of labor disputes (*Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 923 (1957)) and with this Court's adoption of the common law tradition of deference to arbitral determinations (*United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960)).

The decision at bar, moreover, is this court of appeals' first adjudication of a case of this type involving review of an arbitral award and represents a cogent, unanimous opinion by the court of appeals expressly created by Congress in order to make possible "the definitive adjudication of selected categories of cases" without the need for this Court's intervention. S. Rep. No. 97-275, 97th Cong., 1st Sess. 3 (1981), *reprinted in* 1982 U.S. Code Cong. & Ad. News 11. Accordingly, further review is not only unwarranted as a consequence of the complete uniformity of opinion between the courts of appeals concerning the issue presented for review but also antithetical to the intent of the Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, 96 Stat. 25, to provide for efficient and definitive adjudication of the issue at bar by this court of appeals.

1. Petitioner contends (Pet. 10-13) that the court of appeals erred in concluding that an arbitrator "can take account of significant violations of the collective bargain-

ing agreement, important to the union, even though the particular grievants may not have been themselves adversely affected" (Pet. App. 12a). Because the "harmful error" standard of 5 U.S.C. 7701(c)(2)—which is applicable to arbitral, as well as MSPB, proceedings (see *White, supra*, 697 F.2d at 441; *Nutt, supra*, 718 F.2d at 1054, Pet. App. 11a; and *Brisco, supra*, slip op. at 11-12, App. 11a-12a)—requires for its operation proof of actual prejudice to an employee resulting from error by the agency in the application of its procedures, petitioner erroneously reasons that *only* such harmful error—prejudicial to the grieving employee—may be taken into account by an arbitrator in mitigating a penalty. The *White* court of appeals and the court of appeals in this case, however, found persuasive indications in the CSRA's language and statutory scheme that "important *union* rights are also to be enforced in the negotiated grievance procedure." Pet. App. 13a, and *White, supra*, 697 F.2d at 443, *see id.* at 446 (Bork, J., concurring).

The courts of appeals' parallel conclusions are clearly supported by the language and scheme of the Reform Act, as well as by the Congressional intent as manifested in the express overall findings of Congress set forth at 5 U.S.C. 7101(a). As explained by the court of appeals, the role of unions and collective bargaining agreements in the statutory scheme is one, respectively, of a major (if not *the* major) party to the arbitration whose proper interests in the form of negotiated agreements are to be protected (Pet. App. 12a). The CSRA expressly provides, in this regard, that management prerogatives shall not "preclude any agency and any labor organization from negotiating . . . procedures which management officials of the agency will observe in exercising [their] authority" to discipline employees. 5 U.S.C. 7106(b). AFGE and GSA agreed in the instant contract to institute procedures that provide employees with union representation at investigatory interviews and timely notice of proposed adverse action within a reasonable period after the of-

fense or GSA's discovery of an offense. Such procedural safeguards, established by agreement, effectively became bargained-for union rights (Pet. App. 12a). These union rights reflect the "unquestionabl[e] inten[tion]" of Congress in the Act "to strengthen the position of federal unions and to make the collective bargaining process a more effective instrument of the public interest then it had been under the Executive Order regime." *Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority*, —— U.S. ——, 104 S.Ct. 439, 449 (1983) (hereinafter *BATF*). And see 5 U.S.C. 7101(a) ("The Congress finds that • • • labor organizations and collective bargaining in the civil service are in the public interest.")

In the CSRA, moreover, Congress also expressly stated that a "collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability" (5 U.S.C. 7121(a)(1)) in adverse action cases of this type. In matters such as employee removals raised under the negotiated grievance procedure, the union shall be the representative and there must be provision for binding arbitration (if necessary), which may be invoked by either the *union* or the agency. 5 U.S.C. 7121(b)(3)(C) (1982). In view of the foregoing statutory provisions, and in the light of this Court's previous recognition that "the new Act [CSRA] . . . significantly strengthened the position of public employee unions. . ." (*BATF*, *supra*, 104 S.Ct. at 441), it is evident that the CSRA's scheme envisions, as the court of appeals correctly held, "that important *union* rights are also to be enforced in the negotiated grievance procedure" (Pet. App. 13a [emphasis in original]).

Petitioner's contrary contention fails completely to give any effect to the parties' assessment of the substantiality of bargained-for procedural rights, for if "harmful error" must always be shown in the sense that an employee's own case is prejudiced, "then the procedures arrived at

through collective bargaining became meaningless." *White*, *supra*, 697 F.2d at 446 (Bork, J., concurring). In the federal sector, in particular, where unions are limited to bargaining over procedural matters that do not prevent an agency from exercising its reserved management rights (*see Dept. of Defense, AAFES v. FLRA*, 659 F.2d 1140, 1150-58 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945, 102 S.Ct. 1443 (1982)), enforcement of bargained-for rights is crucial to fulfilling the CSRA's objectives, as outlined above. Within the areas in which bargaining is permissible, government managers are surely believed by Congress to be competent to look out for the government's interest. *See id.*, 659 F.2d at 1157. Eroding the safeguards that these managers concede to employees' representatives in the collective bargaining process by applying the MSPB's monolithic "harmful error" standard would thus be inconsistent with Congress' desire to ensure that the federal government, as well as the private sector, received the benefits that flow from collective bargaining (*see* 5 U.S.C. 7101(a)).

Petitioner's further concern that, simply by virtue of the inclusion of a procedural right in a collective bargaining agreement, its violation would provide the basis for the setting aside or mitigation of agency adverse actions (Pet. 13) is also unjustified. Petitioner erroneously characterizes the court of appeals' holding as a "per se approach" (*id.*). Nothing in the petitioned-from decision, however, supports that characterization. In fact, the union argued to the arbitrator in the case at hand that the agency's failure to comply with the agreement's procedural provisions "interfered with the union's preparation for hearings and resulted in the filing of additional unfair labor practices" (Pet. App. 38a). Clearly *there was a showing of prejudice to AFGE*, recognized by the arbitrator (*id.*).

In a later case the court of appeals, furthermore, overturned an arbitrator's award where there was no indica-

tion in the record that the union presented any evidence to the arbitrator that it was harmed by the agency's delay in giving notice to the employee. *See Devine v. Brisco*, *supra*, slip op. at 12, App. 10a. In the absence of a showing of harm to the union, the *Brisco* court would not assume the existence of error harmful to the union, noting that "a mere conjectural possibility of prejudice cannot suffice as a basis for inferring actual prejudice." *Id.* at 13, App. 13a, citing *White*, *supra*, 697 F.2d at 442. In the face of *Brisco*, petitioner's concern that a "per se" rule is promulgated in the petitioned-from decision is totally lacking in foundation.

2. A further objection of petitioner is that the court of appeals' decision frustrates the congressional intent "to promote consistency in the resolution of [burden of proof and standard of proof] issues, and to avoid forum shopping" (Pet. 14, quoting H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 157 (1978)). Petitioner contends that 5 U.S.C. 7121(e)(2) and 5 U.S.C. 7121(f) were "intended to assure conformity between the decision of arbitrators with [sic] those of the Merit Systems Protection Board" (Pet. 14, quoting S. Rep. No. 95-969, 95th Cong., 2d Sess. 111 (1978)). According to petitioner, the result of the decision at bar will be that different standards will be applied to employees' appeals according to whether or not the employees utilize an agreement's grievance and arbitration procedures (Pet. 15) or choose to appeal to the MSPB. Petitioner asserts, in short, not only that arbitrators are bound to follow the statutory standards of proof so as to avoid such differing standards from one forum to another but also, erroneously, that *any* difference in the two types of proceedings should not be tolerated.

Neither respondents herein, nor the courts of appeals, disagree with petitioner insofar as application of the "harmful error" rule to situations where *employees* are prejudiced is concerned. *See White*, *supra*, 697 F.2d at

441; *Nutt*, *supra*, 718 F.2d at 1054; *Brisco*, *supra*, slip op. at 11, App. 10a. The *White* court and *Nutt* court disagree with petitioner. However, with respect to the *scope* of the rule in recognition of the role of unions in the collective bargaining and grievance process. While petitioner urges that the MSPB's interpretation of the rule is the only correct one—requiring prejudice *to the employee*—the courts of appeals have disagreed, as previously discussed, *supra*, 12-16, holding that "the harmful error rule is not limited in applicability to situations where employees are prejudiced, but extends to instances where a union [as in the case at hand] can show violations of contractual provisions tantamount to harmful error to itself." *Brisco*, *supra*, slip op. at 11 (App. 10a), citing *Nutt*, *supra*, 718 F.2d at 1055; *White*, *supra*, 697 F.2d at 443.

Petitioner argues that it is unfair to allow employees in collective bargaining units to benefit from arbitral procedures and standards that are not available to other non-unit employees (Pet. 15), and that only uniformity between arbitral and MSPB proceedings furthers the intent of the CSRA to avoid forum shopping (*id.*). In taking this position petitioner asks this Court to ignore the nature of a collective bargaining agreement, which is both a contract between the parties and "a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578, 80 S.Ct. 1347, 1350 (1960).

A collective bargaining agreement, as the courts have repeatedly recognized, may provide for many procedures advantageous to bargaining unit employees which are not available to non-unit employees, such as the staying of a disciplinary action or personnel action until after a grievance contesting the action has been adjudicated by an arbitrator, to name only one such procedure. *See Dept. of Defense*, *supra* (procedure is negotiable which stays adverse action pending arbitral decision), and *Veterans*

Administration v. FLRA, 675 F.2d 260 (11th Cir. 1982) (procedure is negotiable which stays personnel actions pending arbitral decision). Under 5 U.S.C. 7121(a)(2), moreover, a union and an agency could limit an arbitrator's authority by agreement in a manner which rendered the arbitral process quite different from the MSPB process. The courts of appeals, in recognition of the differing natures of negotiated and statutorily prescribed appeal procedures, have repeatedly held that "nothing in the CSRA requires that arbitration and MSPB actions always adhere to the same standards and procedures, or produce the same results in like cases." *Devine v. Sutermeister*, 724 F.2d 1558, 1565 (Fed. Cir. 1983), quoting with approval *Local 2578, AFGE v. GSA*, 711 F.2d 261, 264 (D.C. Cir. 1983). As in the instant case, courts of appeals acknowledge that "adverse action arbitrations 'are statutorily required to be similar to MSPB hearings in some respects but in other respects may be different.'" Pet. App. 13a, quoting *Otherson v. INS*, 711 F.2d 267, 273 (D.C. Cir. 1983).

Another vitally important reason for this Court to reject the petition is the traditional judicial reluctance to intrude on the arbitral process, particularly where, as in this case, the award draws its essence from the terms of the contract itself and *does not* interpret statutes or regulations in reaching its result. The reasons for such judicial caution are so well established that little elucidation is necessary. The "federal policy favoring arbitration of labor disputes," enunciated in *Textile Workers Union v. Lincoln Mills*, *supra*, and the *Steelworkers Trilogy*,[7] recognizes with respect to labor disputes that arbitration is preferable to litigation by every measurable standard. *See Devine v. White*, *supra*, 697 F.2d notes 66-71, at 435.

---

[7] *United Steelworkers v. Enterprise Wheel & Car Corp.*, *supra*; *United Steelworkers v. Warrior & Gulf Navigation Co.*, *supra*; *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343 (1960).

The advantages of arbitration over litigation in personnel cases—such as speed of resolution, economy, informality, responsiveness to the parties' needs, and conduciveness to the sustenance of on-going employment relations—however, are effectively negated to the degree the judicial review sought by petitioner encroaches on the arbitral process, for

> [i]n order to facilitate national labor goals, the arbitration results must be final and binding. Disputes should be conclusively resolved privately. Protracted litigation acts as an irritant in the . . . relationship and runs counter to the parties' own voluntary commitment to have an arbitrator, and not a court, decide the substance of the dispute. Plenary review of merit determinations would destroy finality.

Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231, 260 (footnote omitted) (1977); *see* Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 427-29 & n.3 (1969). The impact of such a loss of finality on the speed and expense of arbitration[8] is especially clear in the instant case, where an *expedited arbitration procedure*—which was negotiated by the parties and elected by the grievants, and in which the parties mutually eschewed the advantages of a transcript and post-hearing briefs in return for the benefits of speed and economy—is totally vitiated by lengthy judicial review and its attendant costs.

The result of this Court's granting the requested review, moreover, will inevitably be a shift in federal sector arbitration from the arbitral model—in which decision makers are free to focus solely on the case before them rather than on the case as it might appear to an

---

[8] *See, e.g.*, Robins, *The Presidential Address: Threats to Arbitration*, in ARBITRATION ISSUES FOR THE 1980s, PROCEEDINGS OF THE 34TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1, 9 (J. Stern & B. Dennis eds. 1982).

appellate court—to the administrative model—in which decision makers are often concerned primarily with building a record for review. The latter often produces opinions parroting the appropriate statutory standards in conclusory terms, but suffering from a lack of reasoned analysis. Such a shift "would substantially undercut the ability of arbitrators successfully to resolve disputes arising out of the employment relationship," *White*, *supra*, 697 F.2d at 436, and thereby undermine in the federal sector "the amicable settlements of disputes between employees and their employers involving conditions of employment" which Congress expressly found contributing to the public interest, 5 U.S.C. 7101(a), and the "binding arbitration" to which Congress expressly mandated "any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject. . . ." 5 U.S.C. 7121 (b) (3) (C).

In view of the above, this Court should regard the arbitrator's award, as affirmed by the decision at bar, as binding on the parties to the dispute, and its own role in reviewing the award as extremely limited, in accordance with this Court's unequivocal espousal of the common law tradition of deference to arbitral determinations in *United Steelworkers v. Enterprise Wheel & Car Corp.*, *supra*. Since the instant award is based solely on the terms of the contract between GSA and AFGE, and is consistent with law, it is entitled to judicial acceptance as an award that "draws its essence from the collective bargaining agreement." *Enterprise Wheel*, *supra*, 363 U.S. at 597, 80 S.Ct. at 1361.

Accordingly, since petitioner points to no express statutory provision which conflicts with the court of appeals' extension of the "harmful error" rule to errors prejudicial to the union, and since the afore-cited repeated judicial recognition of the nature of arbitration is consistent with the overall intent of the CSRA to "strengthen the

position of federal unions and to make the collective bargaining process a more effective instrument of the public interest," *BATF*, *supra*, 104 S.Ct. at 449, the court of appeals' decision is deserving of affirmance.

3. Petitioner further contends that, because the CSRA sets forth "alternative remedies by which union rights may be fully vindicated" (Pet. 16), the court of appeals erred in permitting union rights to be enforced by means of the negotiated grievance/arbitration procedure. The statutory authorities by which unions may file grievances on their own behalf (5 U.S.C. 7121(b)(3)(A)) or file unfair labor practice charges against agencies (5 U.S.C. 7116 & 7118) are described by petitioner as the exclusive remedies contemplated by the CSRA to protect union rights (Pet. 16-17).

In so contending, petitioner conveniently ignores the CSRA's express prohibition of multiple appeals based on the same facts in different forums. 5 U.S.C. 7121(e)(1), in this regard, provides in pertinent part:

> Matters covered under sections 4303 [performance-based reductions in grade and removals] and 7512 [adverse actions] of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title [before the MSPB and Equal Employment Opportunity Commission] or under the negotiated grievance procedure, *but not both*. . . . An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever occurs first. [Emphasis supplied.]

The foregoing has been construed by the Federal Labor Relations Authority to require an irrevocable election of an appeal process that has the effect of *precluding* the raising of an issue based on the same facts in another appeal process. *See Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO*, 4 FLRA 686 (1980) and cases cited therein, 4 FLRA at 694. Congress intended thereby, obviously, to prevent duplicative adjudicative proceedings based on the same matter which could result in inconsistent resolutions.

Such a proscription is also clear in 5 U.S.C. 7116(d):

> Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

The FLRA has repeatedly interpreted this section to preclude the processing of any unfair labor practice charge when a grievance procedure or a statutory appeals procedure has been initiated with respect to the same matter. *See Internal Revenue Service and National Treasury Employees Union*, 3 FLRA 479 (1980) ("[E]lection by grievants to raise the [contractual violation] in their timely grievances precludes the union raising the same issue under the unfair labor practice procedure [citations omitted] . . . .") Indeed, when AFGE filed unfair labor practice charges in the case at hand against GSA based upon GSA's pervasive violations of the collective bargaining agreement during the instant disciplinary proceedings, the FLRA refused to issue a complaint on the ground that the dispute "should . . . be resolved

through the parties' negotiated grievance/arbitration procedures, rather than in the unfair labor practice forum." Dismissal letter from Marjorie K. Thompson, FLRA Acting Regional Director, Case No. 7-CA-20172, dated April 30, 1982.

The legislative history of the afore-quoted sections, furthermore, establishes a Congressional intent to limit the options available to a union to remedy contract violations by an agency. In pertinent part the Senate Report states with respect to 5 U.S.C. 7116(d) [section 7216(d) in the Senate bill]:

> Subsection (d) is similar to a provision contained in section 19(d) of Executive Order 11491. Under section 19(d), issues which can be raised under a statutory appeal procedure may not be raised as an unfair labor practice. This prohibition is preserved in section 7216(d). However, section 7221(d) of this chapter permits a negotiated grievance procedure to cover matters for which a statutory appeal procedure exists, except for those matters specifically enumerated. Where a negotiated grievance procedure covers a non-excepted matter for which a statutory appeal procedure exists (other than adverse action and discrimination matters), the otherwise applicable statutory appeal procedure may not be invoked to resolve such matters. Accordingly, the issues involved may be raised either under the negotiated grievance procedure or, where appropriate, in an unfair labor practice proceeding. Those matters specifically enumerated in section 7221(d), which cannot be covered in a negotiated grievance procedure must be resolved exclusively under the applicable statutory appeal procedure. Accordingly, issues which can be raised under such statutory appeal procedure may not be raised in an unfair labor practice proceeding. Finally, where discrimination or adverse action matters (including demotion or removal for unacceptable performance under section 4303 of this title) are covered by a negotiated griev-

> ance procedure, an employee has the option of using either the negotiated procedure or statutory procedures. The use of either option will preclude the use of the unfair labor practice procedure.

S. Rep. No. 95-969, 95th Cong., 2d Sess. 107 (1978).

As 5 U.S.C. 7121(e), 5 U.S.C. 7116(d), and the aforequoted legislative history demonstrate, accordingly, Congress clearly intended in the Act to avoid repetitious litigation in different forums based on the same factual situation. Petitioner's contrary proposition—that the union should file separate grievances, invoke separate arbitration, and file separate unfair labor practice charges in order to enforce its own rights, notwithstanding an identity of facts with the employees' appeals (Pet. 16-17)—would result in duplicative administrative proceedings, substantial unnecessary costs to both agencies and unions, great waste of the time and energy of federal employee participants, and additional judicial appeals from the multiple administrative adjudications to an already overburdened appellate judiciary. It is clear that petitioner's interpretation of the CSRA, consequently, conflicts with the express mandate of 5 U.S.C. 7101(b): "[T]he provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government." The court of appeals' decision, on the other hand, furthers government effectiveness and efficiency by permitting an arbitrator in one adjudication to preserve the vitality and integrity of provisions of collective bargaining agreements important to the parties in the collective bargaining process.

4. Although petitioner recognizes that the United States Court of Appeals for the Federal Circuit was created by Congress to provide for "the definitive adjudication of selected categories of cases" (Pet. 17, quoting S. Rep. No. 97-275, 97th Cong., 1st Sess. 3 (1981)), and, thereby, to obviate the need for this Court's intervention (Pet. 17), petitioner nevertheless pursues this appeal be-

cause: (1) this case is allegedly of such widespread significance or patent erroneousness that review by this Court is warranted (Pet. 17-18); and (2) this case supposedly raises an issue that "might well be insulated from any consideration by this Court" (*id.* at 19) in the future.

Neither of the above contentions is supportable. As previously noted, *supra*, 12-16, the courts of appeals are unanimous in concluding without dissent that an arbitrator may properly mitigate discipline based upon violations of a collective bargaining agreement which are harmful to the union. The petitioned-from decision, moreover, has been cited approvingly by other unanimous panels. *Cf. Sutermeister*, *supra*, 724 F.2d at 1565; *Brisco*, *supra*, slip op. at 10-11 (App. 9a-10a). Thus, there are no conflicts between the courts of appeals or disagreements among the distinguished judges of the Federal Circuit Court of Appeals or the D.C. Circuit Court of Appeals on the issue presented. "Patent erroneousness," as a consequence, appears unlikely.

While the decision may be significant in circumstances where an agency violates a collective bargaining agreement, furthermore, such significance is hardly "widespread" unless federal agencies' violations of such agreements are correspondingly widespread. Consideration by the Court of the issue presented by this case, therefore, is both unnecessary and premature, particularly since this is the first time this court of appeals has addressed the issue, and there has been little opportunity for further evaluation and development of the court of appeals' rationale.

No authority is cited by petitioner for his statement that in the future the issue at hand "might well be insulated from any consideration by this Court" (Pet. 19), and respondents know of no reason why this Court would be precluded in the future from review of any decision

of the court of appeals pursuant to 28 U.S.C. 1254(1), including a decision of the court of appeals to decline to exercise its discretion to entertain an appeal. There is, therefore, no justification for granting the instant petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES A. HOBBIE
Staff Counsel

MARK D. ROTH
Acting General Counsel
American Federation of
Government Employees,
AFL-CIO

June, 1984

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 83-1110

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

C. CHESTER BRISCO, ARBITRATOR,
UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
Respondents.

DECIDED: April 27, 1984

Before BALDWIN, MILLER, and SMITH, *Circuit Judges*.

MILLER, *Circuit Judge*.

Donald J. Devine, Director of the Office of Personnel Management ("OPM"), pursuant to 5 U.S.C. § 7703(d) (1982),[1] brings this petition for review of an arbitration

---

[1] 5 U.S.C. § 7703(d) provides:

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a sub-

award, issued by respondent C. Chester Brisco ("Arbitrator Brisco"), reducing the duration of the suspension given to Ross E. Parrish, Jr., the grievant, to 30 days.[2] Petitioner also named the United States Department of Justice, Immigration and Naturalization Service, Western Regional Office ("INS"), and the National Immigration and Naturalization Service Council, American Federation of Government Employees, Local 2805, AFL-CIO ("AFGE"), as respondents. Petitioner asserts that Arbitrator Brisco erred in interpreting a civil service law and that his decision, if allowed to stand, will have a substantial impact on civil service law because it would allow parties to a collective bargaining agreement to abrogate the harmful error standard of 5 U.S.C. § 7701 (c)(2)(A) (1982). We exercise our discretion to grant petitioner's request for review and reverse Arbitrator Brisco's decision reducing Parrish's suspension.

BACKGROUND

In a letter dated November 5, 1981, INS proposed removing, or taking some lesser disciplinary action against, Ross E. Parrish, Jr., an INS Immigration Inspector, for the following reasons: inflicting bodily injury to another while on duty on April 7, 1981 (Reason I), refusal to carry out a proper order from a supervisor on or about May 23, 1981 (Reason II), unauthorized possession of a Government document (Reason III), and misuse of au-

---

stantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

[2] OPM petitions for review under 5 U.S.C. § 7703(d) are made applicable to arbitration awards by 5 U.S.C. § 7121(f) (1982).

thority and an official Government document (Reason IV). Parrish's representative, AFGE Local 2805 President Sherman M. Swanson, responded to INS's proposal of adverse action in a letter dated November 18, 1981. After considering this response, INS District Director James J. O'Keefe, in his letter of January 7, 1982, sustained Reasons I (partially) and II (entirely), did not sustain Reasons III and IV, and imposed a 60-day suspension for the sustained Reasons. O'Keefe's letter notified Parrish of his right to appeal the suspension either to the Merit Systems Protection Board ("MSPB") or under the grievance and arbitration procedure established by the collective bargaining agreement between AFGE and INS.

Parrish elected to challenge his suspension through the grievance and arbitration procedure, and a grievance was filed on his behalf by AFGE. The parties, AFGE and INS, selected C. Chester Brisco as the arbitrator and submitted the following issues for resolution: (1) "[d]id the Service suspend Ross E. Parrish for 60 days for just and sufficient cause and only for such reasons which promote the efficiency of the Service?" and (2) "[i]f no [sic], what is the appropriate remedy?"

In contesting Parrish's suspension before Arbitrator Brisco, AFGE argued for restoration of Parrish's lost pay and erasure of the disciplinary action from the record, because: the credibility of those testifying that Parrish inflicted bodily injury was questionable; Parrish's use of force was a reflex action in response to being attacked; the order given by Parrish's supervisor was unlawful; and INS violated Article 31, Section F.(3) of the collective bargaining agreement[3] by delaying unrea-

---

[3] Article 31—Disciplinary Actions, Section F.(3) provides in pertinent part:

> The Employer shall furnish employees with notices of proposed disciplinary actions at the earliest practicable date after the alleged offense has been committed and made known to the Employer.

sonably in notifying Parrish of the proposed disciplinary action. The last of these arguments is set forth in AFGE's post-hearing brief as follows:

> The only answer that a reasonable person can conclude is that management failed to follow the terms of the contract with the union. It can reasonably be established that when a disciplinary action is not taken within a reasonable period of time after occurrence, the corrective nature of the disciplinary action loses its rational connection with the incident and merely becomes punitive. In order for in[illegible]trial discipline to survive it must be corrective [illegible]her than punitive, or so I have been led to believe. [illegible]upposedly management's final intent is to correc[illegible] the deficient individual's behavior and prevent reoccurrence [sic] of similar acts. When the discipline is imposed long after the alleged wrongful act (ten months in this case) it becomes arbitrary and capricious. We must contend that this unnecessary ten month delay by the service is clearly a violation of the present labor agreement, specifically, Article 31f(3).

INS sought denial of the grievance, because the reasons for the suspensions were supported by testimony. The discipline given to Parrish was said to have been imposed in a timely manner, and, in any event, the delay was not shown to have been harmful error under 5 U.S.C. § 7701(c)(2)(A) which prejudiced Parrish's rights or his ability to defend himself.

Addressing the timeliness of the notice of proposed discipline first, Arbitrator Brisco stated that although the harmful error rule applied for appeals to the MSPB, an arbitration proceeding is governed by the collective bargaining agreement. He found that the collective bargaining agreement only incorporated 5 U.S.C. § 7701 (c)(1) (1982), but not the harmful error rule of 5 U.S.C. § 7701(c)(2)(A) (1982), because only the language of the former subsection was used in the collective bargaining agreement,[4] which evidenced the parties' intent to exclude the harmful error rule.[5] Therefore, Arbitrator Brisco decided that the question of timeliness had to be considered as a part of the just cause standard, whereby discipline imposed long after the wrongful act is deemed to lack just cause. Article 31, Section F.(3) of the collective bargaining agreement requiring that notice of proposed discipline be furnished "at the earliest practicable date after the alleged offense" was cited as support for using the just cause standard.

---

[4] 5 U.S.C. § 7701(c) (1982) provides:

> (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—
>
> (A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.
>
> (2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—
>
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
>
> (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or
>
> (C) shows that the decision was not in accordance with law.

[5] The pertinent portion of the collective bargaining agreement is Article 31, Section G.(4) which provides:

> In arbitration over adverse actions for performance or efficiency under 5 USC Sections 4303 and 7512 (Civil Service Reform Act of 1978), an arbitrator shall be governed by Section 7701(c) of Title 5. That provision provides that an action shall be affirmed if for unacceptable performance if supported by substantial evidence; and affirmed if for efficiency if supported by the preponderance of the evidence.

Turning to the merits of the grievance, Arbitrator Brisco ruled that Parrish's conduct was clearly insubordinate, but found that the disciplinary action was without just cause, because INS offered no explanation for waiting from May 23, 1981, when it had all the facts, until November 12, 1981 to inform Parish that he would be disciplined. As to the charge of inflicting bodily injury to another while on duty, Arbitrator Brisco concluded that Parrish did commit this action and that he lacked sufficient cause for doing so. The delay from April 7, 1981, when the incident occurred, until November 12, 1981, when Parrish received notice of the proposed disciplinary action, was deemed reasonable, because investigation of the incident was fairly complex; there were a number of witnesses and INS had to coordinate its efforts with the U.S. Attorney's Office which was considering criminal prosecution.[4] Finding that the agency had imposed a 30-day suspension for each of the sustained reasons, Arbitrator Brisco overturned the 30-day suspension for insubordination in view of his conclusion that this discipline lacked good cause. The 30-day suspension for inflicting bodily injury while on duty was sustained.

OPM received Arbitrator Brisco's decision on September 23, 1982 and filed a petition for reconsideration pursuant to 5 U.S.C. § 7703(d) on November 16, 1982. Arbitrator Brisco denied the petition on December 10, 1982, saying that even if he felt disposed to grant the relief OPM requested, which he did not, he no longer had authority over the matter absent a new mutual grant of jurisdiction by the parties. The decision was received by OPM on December 14, 1982, and OPM filed its petition for review by this court on January 13, 1983.

---

[4] The U.S. Attorney's Office decided not to pursue criminal prosecution, but recommended that administrative sanctions be imposed if appropriate.

ANALYSIS

Jurisdiction

Under 5 U.S.C. § 7703(d) in combination with 5 U.S.C. § 7121(f), the Director of OPM may petition for review of an arbitrator's decision if it will have a substantial impact on a civil service law, rule, or regulation. When such a petition is filed, it is incumbent upon OPM to demonstrate that the decision appealed from will have a substantial impact on civil service law. *Devine* v. *Sutermeister*, 724 F.2d 1558, 1562 (Fed. Cir. 1983). This court, however, must independently decide whether an exercise of its discretionary jurisdiction is warranted. *Id.* In determining whether such discretion should be exercised, we must balance the desirability of review against the traditional labor law policy of judicial deference to arbitrators' decisions. *Devine* v. *Nutt*, 718 F.2d 1048, 1052 (Fed. Cir. 1983).

We agree with OPM that jurisdiction should be exercised in this case, because it raises for the first time the issue of whether an arbitrator can refuse to apply the harmful error rule if he concludes that the collective bargaining agreement does not require application of the rule.

This Court stated in *Devine* v. *Nutt*:

> Judicial deference to an arbitral award may be inappropriate when the award is in apparent conflict with a federal statute that is distinct from the operation of the collective bargaining agreement.

718 F.2d at 1053. Under 5 U.S.C. § 7701(c)(2)(A), an agency action may not be sustained if the procedures used to arrive at a decision are shown to have been harmful error. Here, Arbitrator Brisco appears to have acted inconsistently with this statutory provision by refusing to apply the harmful error rule because it was not incorporated in the collective bargaining agreement. Such a decision, if allowed to stand, will have a substantial im-

pact upon whether Congressional enactments concerning the civil service will be followed and how much freedom agencies and unions will have in drafting collective bargaining agreements involving civil servants. Accordingly, we grant the petition for review and exercise our jurisdiction.

AFGE argues that the issue presented in OPM's petition was decided in *Devine* v. *Nutt*, and, therefore, we should not exercise our jurisdiction in this case. However, *Devine* v. *Nutt* did not address the same question, but rather was concerned with whether the harmful error standard was met where the union raised procedural errors on its own behalf during proceedings before the arbitrator.

AFGE further argues that the petition for reconsideration was submitted to Arbitrator Brisco 54 days after OPM's receipt of his decision, and, therefore, was not timely filed. In *Devine* v. *Sutermeister*, No. 83-813, order at 3 (Fed. Cir. April 12, 1983), this court determined that OPM must seek reconsideration within 30 days of an arbitrator's decision. Subsequently, it was decided that this holding would not apply retroactively. *Devine* v. *Levin*, No. 13, order at 2 (Fed. Cir. April 25, 1983). In the present case, OPM petitioned Arbitrator Brisco for reconsideration prior to April 12, 1983. Accordingly, OPM's failure to seek reconsideration in a timely manner is excused.

The Harmful Error Rule

It is elementary that parties to a collective bargaining agreement cannot bargain for provisions that are contrary to the law. *See Graphic Arts International Union, Local No. 280* v. *N.L.R.B.*, 596 F.2d 904 (9th Cir. 1979); *Thompson* v. *Board of Education*, 526 F.Supp. 1035 (W.D. Mich. 1981). In providing for collective bargaining between the Government and labor organizations, Congress enacted 5 U.S.C. § 7117(a)(2) (1982), which

provides that "[t]he duty to bargain in good faith shall, *to the extent not inconsistent with any Federal law or any Government-wide rule or regulation*," extend to certain agency regulations (emphasis added). This provision has been interpreted to require union and federal agencies to negotiate over terms and conditions of employment, unless a bargaining proposal is inconsistent with existing federal law, rule, or regulation. *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, 52 U.S.L.W. 4013, 4014 (U.S. 1983). Since Congress has affirmatively preserved certain agency rights by enacting the Civil Service Reform Act of 1978, an agency cannot contract away those rights. *United States Department of Justice* v. *Federal Labor Relations Authority*, 709 F.2d 724 (D.C. Cir. 1983).

As to an arbitrator's authority to make awards under a collective bargaining agreement, this court held in *Devine* v. *Nutt* that:

> [a]lthough the arbitrator is free to make an award consonant with the scope of the collective bargaining agreement, he must not issue awards that conflict with "external law" such as federal statutes and regulations (citations omitted).

718 F.2d at 1055.

In this case, Arbitrator Brisco's decision contravened these principles.

When Congress enacted the harmful error rule of 5 U.S.C. § 7701(c)(2)(A), it intended to change the standard of appellate review to avoid unnecessary reversal of agency actions because of technical procedural oversights. S. Rep. No. 969, 95th Cong., 2d Sess. 54, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2776. By ruling that parties to a collective bargaining agreement could exclude the harmful error rule from the agreement, Arbitrator Brisco effectively and erroneously concluded that INS and

AFGE had authority to abrogate a provision of the Civil Service Reform Act of 1978.

Under the Congressionally-established standard of review, the MSPB must sustain an agency decision "supported by a preponderance of the evidence," 5 U.S.C. § 7701(c)(1)(B), unless the employee shows, among other things, harmful error in the agency's decision-making procedures, 5 U.S.C. § 7701(c)(2)(A). *Devine* v. *White*, 697 F.2d 421, 441 (D.C. Cir. 1983). Arbitrators are required to follow this rule by 5 U.S.C. § 7121 (e)(2) (1982). *Devine* v. *Nutt*, 718 F.2d at 1054 . The harmful error rule is not, however, limited in applicability to situations where employees are prejudiced, but extends to instances where a union can show violations tantamount to harmful error to itself. *Id.* at 1055. Accordingly, we hold that Arbitrator Brisco's decision to overturn Parrish's suspension for insubordination without requiring Parrish or AFGE to show harmful error was not in accordance with the law.[7]

The harmful error rule can appropriately be regarded as part of the " 'standard of proof' (if not of the burden of proof itself)," and, therefore, must be applied by the arbitrator. *Devine* v. *Nutt*, 718 F.2d at 1054. If this court were to sustain Arbitrator Brisco's decision, the lower standard (or burden) of proof required by him compared to that required by the MSPB would promote inconsistency and forum shopping, contrary to Congressional intent. H.R. Rep. No. 1717, 95th Cong., 2d Sess. 157, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2891.

There is no contention that Parrish was prejudiced by INS's delay in advising him of its proposed disciplinary action. In its brief, AFGE even asserts that Arbitrator

[7] We need not decide whether Arbitrator Brisco correctly determined that the parties to the collective bargaining agreement intended to exclude the harmful error rule.

Brisco's award is similar to that in *Devine* v. *Nutt*, because there was no prejudice to the individual grievant in either case.

AFGE does, however, argue that INS's delay in giving Parrish notice of the proposed disciplinary action harmed AFGE in the same way that the union was harmed by a similar delay in *Devine* v. *Nutt*. However, the facts of the present case are distinguishable from those in *Devine* v. *Nutt*, where the union argued to the arbitrator that the agency's failure to comply with the notification time limitations of the collective bargaining agreement and its failure to promptly supply requested information interfered with the union's preparation for hearings and resulted in the filing of additional unfair labor practice charges. Because the agency failed to comply with these provisions of the agreement, the arbitrator mitigated the agency-imposed penalties even though he found that the grievants were not personally prejudiced. In this case, however, there is no indication in the record that AFGE presented any evidence to Arbitrator Brisco that it was harmed by INS's delay in giving notice to Parrish;[8] further, AFGE's post-hearing brief makes no assertion that AFGE was harmed by the delay. In the absence of a showing of harm to AFGE, we are, in effect, asked to assume the existence of harmful error, because timely notice is lacking here as it was in *Devine* v. *Nutt*. However, a mere conjectural possibility of prejudice cannot suffice as a basis for inferring actual prejudice. *Devine* v. *White*, 697 F.2d at 442. Moreover, since the issue of harm to the union was not raised before Arbitrator Brisco, it cannot now be raised for the first time on appeal. *Duffy* v. *U.S.*, 690 F.2d 889, 896 (Ct. Cl. 1982); *Razik* v. *U.S.*, 525 F.2d 1028, 1034 (Ct. Cl. 1975).

[8] The only witnesses called by AFGE were Parrish and Immigration Inspectors Jones and Crusilla. None testified that AFGE was harmed by INS's delay in giving Parrish notice of the proposed disciplinary action.

In view of the foregoing, Arbitrator Brisco's decision overturning the 30-day suspension for insubordination is reversed.[9, 10]

REVERSED

---

[9] The only issue before us is petitioner's request for review of Arbitrator Brisco's decision to overturn Parrish's suspension for insubordination. Accordingly, we have not considered whether Arbitrator Brisco's decision to sustain the suspension for inflicting bodily harm while on duty was proper.

[10] We decline to grant AFGE's request made at oral argument to vacate and remand for further proceedings, because AFGE already had the opportunity to present evidence of harmful error to Arbitrator Brisco and failed to do so.

AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
FILED
[illegible] 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1673 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

ALLISON E. NUTT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN OPPOSITION

LOIS G. WILLIAMS
Director of Litigation

KERRY L. ADAMS
Assistant Director of Litigation

RICHARD S. EDELMAN
Assistant Counsel

NATIONAL TREASURY EMPLOYEES UNION
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006
(202) 785-4411

---

17 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the lower court correctly interpreted the Civil Service Reform Act's "harmful error" rule, 5 U.S.C. 7701(c)(2)(A), as allowing an arbitrator to enforce important contractual due process provisions that were pervasively violated by the agency employer, by mitigating agency penalties absent prejudice to the individual grievants.

TABLE OF CONTENTS

Page

Statement of Interest of Amicus Curiae 1

Opinions Below 1

Jurisdiction 2

Statement 2

Argument 6

Conclusion 13

TABLE OF AUTHORITIES

Cases: Page

Department of Defense, Army Air Force Exchange Service v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982) 6

Devine v. *Brisco*, No. 83-1110 (Fed. Cir. April 27, 1984) 10

Devine v. *White*, 697 F.2d 421 (D.C. Cir. 1983) 6,8,9,12

Otherson v. *INS*, 711 F.2d 267 (D.C. Cir. 1983) 12

United Steelworkers v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960) 6

Page

Statutes and regulations:

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 3

5 U.S.C. 7101 6
5 U.S.C. 7102 6
5 U.S.C. 7103(a)(9) 6
5 U.S.C. 7103(a)(12) 6
5 U.S.C. 7103(a)(14) 6
5 U.S.C. 7106(a)(2)(a) 6
5 U.S.C. 7106(b)(2) 6
5 U.S.C. 7513(d) 4
5 U.S.C. 7701(a) 4
5 U.S.C. 7701(c) 5,8
5 U.S.C. 7701(c)(2)(A) 5,6,7,8,9
5 U.S.C. 7703(d) 4
5 U.S.C. 7121(a),(b) 6
5 U.S.C. 7121(e)(1) 3
5 U.S.C. 7121(e)(2) 8
5 U.S.C. 7121(f) 4

Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25 10

28 U.S.C. 1295(a)(9) 10

31 U.S.C. 1349(b) 5

Miscellaneous:

H.R. Rep. 95-1717, 95th Cong., 2d Sess. (1978) 12

S. Rep. 95-969, 95th Cong., 2d Sess. (1978) 7

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1673

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

ALLISON E. NUTT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN OPPOSITION

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Treasury Employees Union (NTEU) is the third largest federal sector labor organization. Pursuant to Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, NTEU is the exclusive bargaining representative of approximately 110,000 federal employees throughout the nation. NTEU represents the employment interests of the members of its bargaining units, *inter alia,* by negotiating collective bargaining agreements with federal agency employers and by arbitrating grievances under such agreements. Thus, the interests of NTEU, and the federal employees it represents, will be affected by any decision in this case, which involves the application of the statutory "harmful error" rule in arbitration proceedings.

OPINIONS BELOW

The court of appeals decision (Pet. App. 1a-16a) is

reported at 718 F.2d 1048. The court of appeals denied respondent's motion to dismiss in an unreported order (Pet. App. 17a-20a). The arbitration decision and award and the revised award (Pet. App. 21a-41a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a) was entered on September 22, 1983. A petition for rehearing was denied on November 18, 1983 (Pet. App. 43a). On February 10, 1984, the Chief Justice extended the time for filing a petition for a writ of certiorari to, and including, April 16, 1984. The petition for a writ of certiorari was filed on April 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Thomas Rogers and Robert Wilson, Jr. (the grievants) were employed by the General Services Administration (GSA or the Agency) as Federal Protective Service Officers at the Denver Federal Center, Denver, Colorado (Pet. App. 2a, 23a). Both grievants were members of a collective bargaining unit whose exclusive representative was respondent American Federation of Government Employees, Local 3275 (the Union). GSA sought to remove Wilson from his position with the Agency for falsification of official government tape recordings monitoring conversations between the Agency command post and patrol officers and for concealing activities which should have been a matter of record. The Agency sought to remove Rogers from his position for falsification of government records, failure to report suspected irregularities and use of a government vehicle for other than official purposes (Pet. App. 4a, 28a-29a).

During its investigation of these charges, GSA agents conducted initial "non-custodial" interrogations of

Wilson and Rogers. The agents subsequently met a second time with the individual grievants to have them sign affidavits prepared from notes taken during the first interrogations. Contrary to a provision of the collective bargaining agreement between the Agency and Union,[1] at no time was either grievant informed of his right to have a union representative present during the interrogations (Pet. App. 3a-4a, 26a-28a).

Wilson and Rogers first received notice of the Agency's proposal to remove them on April 2, 1982, nearly three months after the incidents which the Agency cited as the basis for the removal actions (Pet. App. 4a, 28a). The collective bargaining agreement required that notice of proposed discipline be issued "within a reasonable period of time (normally 40 calendar days) after the occurrence of the alleged offense or when the offense becomes known to management."[2]

2. Pursuant to the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (7121 (e)(1)), and the collective bargaining agreement between their Union and the Agency, Wilson and Rogers challenged

---

[1]Article XXVII, Section 2, of the collective bargaining agreement between GSA and the Union provides:

> The Employer agrees that during formal discussion where interrogation or written or sworn statements are taken from an employee, in connection with a charge that may result in disciplinary action against him, he will have the opportunity to have a representative present. It should be understood that counseling sessions are not formal discussions.

[2]Article XXVII, Section 3, of the collective bargaining agreement provides, in pertinent part:

> PROPOSED NOTICE: In the event an employee is issued a notice of proposed disciplinary or adverse action, that employee must be afforded and made aware of all his/her rights. These proposed notices shall be served on the employee(s) within a reasonable period of time (normally 40 calendar days) after the occurrence of the alleged offense or when the alleged offense becomes known to management.

their removal actions through the contractual arbitration procedures (Pet. App. 32a).[3]

The arbitrator (respondent Nutt) found that the grievants had committed the alleged acts of wrongdoing (Pet. App. 4a, 32a), but reduced the removal actions to two-week suspensions without pay because of the Agency's "pervasive" violations of the procedures it negotiated in the collective bargaining agreement (Pet. App. 38a). Specifically, the Agency violated the agreement 1) by failing to advise the grievants of their right to representation at the four separate interrogations and 2) by issuing the notices of proposed removal beyond the contractual time limitations, causing "inordinate" delay (Pet. App. 5a, 34a, 36a-37a). While recognizing that the grievants' actions would "under normal circumstances justify their removal from government service" (Pet. App. 32a), the arbitrator found that the "Agency's pervasive failure to comply with the due process requirements" of the collective bargaining agreement justified reduction of the penalties imposed to "assure the Agency's making certain that the contract is followed in the future" (Pet. App. 36a, 38a). The arbitrator deemed this award appropriate even though the due process violations were not shown to be prejudicial to the grievants --i.e., were not shown to have affected the Agency's removal decision (Pet. App. 35a, 37a).

3. Pursuant to 5 U.S.C. 7703(d) and 7121(f), petitioner, the Director of the Office of Personnel Management, sought review of the arbitrator's decision by the United States Court of Appeals for the Federal Circuit. The court

[3]Wilson and Rogers had the choice of appealing the actions through arbitration or through appeals to the Merit Systems Protection Board (MSPB or Board). 5 U.S.C. 7513(d), 7701(a).

affirmed the decision and award of the arbitrator in all but one respect not at issue here.[4]

The court recognized that the grievants had not been personally prejudiced by the Agency's violations of contractual procedures (Pet. App. 14a), but it also noted that the procedural safeguards were significant measures for the Union and its members and that the procedural safeguards became "union rights" (Pet. App. 12a, 14a); such union rights were held to be properly enforced through the grievance procedure (Pet. App. 13a). Accordingly, the arbitrator's holding that the Agency's "pervasive failure" to comply with contractual due process requirements justified mitigation of the penalties, was found by the court to "draw its essence from the collective bargaining agreement." The court additionally found that the award "did not controvert any civil service law or regulation" and therefore affirmed the arbitrator's decision to enforce the contractual procedures by mitigating the penalties (Pet. App. 13a-14a).

The court clearly held that, in adverse action cases, arbitrators must apply the same burdens of proof and standards of proof that are applied by the MSPB under 5 U.S.C. 7701(c). In particular, arbitrators must apply the statutory "harmful error" standard, which provides that an agency's adverse action decision may not be sustained if the employee "shows harmful error in the application of the agency's procedures in arriving at such decision." (Pet. App. 10a-11a). However, the court recognized that "violations of explicit and important procedural rights contained in a contract, such as these, could fairly be said to be tantamount to 'harmful error' to the union within the scope of 5 U.S.C. § 7701 (c)(2)(A) (1982)." Accordingly, the arbitrator's enforcement of the "vitality of these provisions by, in effect, penalizing the agency for

[4]The court held that the arbitrator lacked authority to reduce Rogers' penalty to less than a one-month suspension, the statutory minimum penalty for misuse of a government vehicle (31 U.S.C. 1349(b)) (Pet. App. 14a-16a).

disregarding them was reasonable and within the scope of his authority," citing *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960) (Pet. App. 14a).

ARGUMENT

The decision below is consistent with the CSRA's mandate for collective bargaining between federal employee unions and agency employers, properly applies the "harmful error" provisions of 5 U.S.C. 7701(c)(2)(A) and does not create impermissible distinctions between federal employees who are members of bargaining units and those who are not. Moreover, the decision is fully consistent with the only other circuit court opinion regarding the applicability of the "harmful error" standard to the arbitral process. Further review by this Court is therefore not warranted.

1. Subject to specific exceptions, the CSRA requires federal agencies to bargain with unions representing their employees concerning terms and conditions of employment. 5 U.S.C. 7101, 7102, 7103(a)(12), (14). While an agency's authority to discipline employees is not a negotiable subject, agencies may negotiate concerning *procedures* which management officials will observe in exercising that authority. 5 U.S.C. 7106(a)(2)(A), 7106(b)(2). See *Department of Defense, Army Air Force Exchange Service* v. *FLRA*, 659 F.2d 1140, 1150-58 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *Devine* v. *White*, 697 F.2d 421, 427 n.11 (D.C. Cir. 1983).

The CSRA also requires that every federal sector collective bargaining agreement contain a grievance procedure and provide for binding arbitration of grievances. 5 U.S.C. 7121(a), (b). The court of appeals properly took

[5]Among other things, employees and unions may grieve violations of the collective bargaining agreements and violations of federal laws, rules or regulations concerning conditions of employment (including laws governing adverse actions). 5 U.S.C. 7103 (a)(9), 7121(a)-(b). See also *Devine* v. *White*, *supra*, 697 F.2d at 440.

note of traditional federal policies favoring arbitration of labor disputes and giving deference to arbitral awards (Pet. App. 9a). The court also correctly stated that arbitration awards that draw their essence from the collective bargaining agreement and do not conflict with civil service statutory or regulatory authority should be affirmed (Pet. App. 13a-14a).

Thus, the court's decision is fully consistent with basic principles of labor law and the CSRA's mandate for collective bargaining in the federal sector. It affirms an arbitration award that effectuates procedural due process requirements, which are lawful subjects of bargaining and were voluntarily negotiated by the Agency and the Union.

2. Petitioner nevertheless maintains that the decision below is in error. It contends that the statutory "harmful error" rule allows an agency action to be overturned *only* where there has been prejudice to the individual employee -- i.e., where, in absence of the procedural error, the agency might have reached a different result in that case (Pet. 10). The statute itself, however, does not state, or even suggest, that harmful error can only exist where there is such prejudice to the particular grievant. The statute merely states that an agency decision may not be sustained if there was "harmful error in the application of the agency's procedures in arriving at such decision." 5 U.S.C. 7701 (c)(2)(A).

Moreover, the legislative history does not answer the question posed here. Petitioner relies (Pet. 11) on legislative history surrounding an earlier version of the harmful error rule, contained in the original Senate bill. That legislative history does state that the rule in the Senate bill required substantial impairment of the rights of the individual employees. S. Rep. 95-969, 95th Cong., 2d Sess. 51, 54, 64 (1978). But that legislative history is inapplicable because the language of the original Senate bill *itself* contained the reference to impairment of the rights "of the employee." *Id.* at 179, 224. That language was

not ultimately enacted. Thus, there is no legislative history limiting the "harmful error" rule--as it was ultimately enacted--to situations where there is prejudice to the particular individual as opposed to collective or union rights.[6]

3. The lower court's interpretation of the statutory language is in fact proper and is fully consistent with the D.C. Circuit's extensive analysis of the harmful error standard in *Devine* v. *White*, 697 F.2d 421 (1983).[7] The court interpreted the ambiguous statutory language[8] as imposing the harmful error standard on arbitration as well as MSPB proceedings. The court also concurred, however, with the D.C. Circuit's holding in *Devine* v. *White*, and held that the rule allows an arbitrator to "take account of significant violations of the collective bargaining agreement, important to the union even though the particular grievants may not have been themselves adversely affected" (Pet. App. 12a).

The rationale is simple: "The union is a major (if not *the* major) party to the arbitration and its proper interests are to be protected," under the statutory scheme (Pet. App. 12a). The procedural safeguards that the Agency agreed to, and then pervasively violated in this case, were properly deemed by the arbitrator to be "important *union* rights [that] are also to be enforced in the negotiated

---

[6]Petitioner makes much of the fact that the Conference Report did not note a substantive change in meaning between the Senate bill and the ultimately-enacted version (Pet. 12). But the fact remains that Congress failed to enact the language referring to prejudice to the individual employee. It is more logical to assume that Congress deleted the reference to individual rights for a reason, rather than to assume that it substantially changed the wording but not the meaning.

[7]Arbitration award affirmed, after remand, at 711 F.2d 1082 (1983).

[8]The statute does not directly make the harmful error rule applicable to arbitration proceedings. But both the Federal Circuit below and D.C. Circuit in *Devine* v. *White*, concluded that 5 U.S.C. 7121(e)(2)'s incorporation of Section 7701(c)(1) should be read to include Section 7701(c)(2)(A).

grievance procedure" (Pet. App. 13a). Violation of such rights does damage to the statutory scheme, and, depending on the circumstances, may constitute "harmful error" within the meaning of Section 7701(c)(2)(A).

The D.C. Circuit[9] has adopted the same result, employing slightly different reasoning. In *Devine* v. *White*, it held that where an Agency and Union "impose specific procedural requirements in their agreement," an arbitrator may, depending on the facts, "find 'harmful error' even absent evidence that the violation led to a loss of evidence or other measurable adverse effects." 697 F.2d at 443. In other words, there would be harmful error "under the theory that some bargained-for procedural rights are, by definition, substantial rights of an employee." *Ibid.* See also, Bork, J. concurring., *id.* at 446.

The Federal and D.C. Circuits are clearly justified in interpreting the harmful error rule as allowing a remedy for violations of important "union" rights, or those collectively negotiated for all unit employees, regardless of the impact on the particular case. Petitioner's approach, which would not remedy harmful violations of substantial collective rights,[10] artificially separates a union from its members. A union is its membership; it negotiates due process rights as the collective rights of all individual unit employees. Due to the very nature of the arbitration process, the union is the proper party to assert and enforce

---

[9]By virtue of the Federal Courts Improvement Act of 1982, Pub. L. 97-164, 96 Stat. 25, all such arbitration cases are now appealable solely to the Federal Circuit. 28 U.S.C. 1295(a)(9).

[10]Petitioner argues (Pet. 16-17) that unions would have "ample opportunity to protect their own rights" absent the harmful error rule adopted below. A "cease and desist" order, obtained in a union grievance or unfair labor practice proceeding, would be relatively ineffectual, however. The remedy of mitigating a particular agency penalty is the only true way to ensure that the Agency will make "certain that the contract is followed in the future" (Pet. App. 36a).

those collective rights, on behalf of all members. It is therefore appropriate to mitigate a disciplinary action tainted by violations of important contractual procedural safeguards, in order to protect the collective interests of the union membership and to ensure that such violations are not repeated.

4. Contrary to petitioner's contentions (Pet. 12, 13), the ruling below does not impose a "per se" rule for procedural contract violations or otherwise "eviscerate" the harmful error standard. The arbitrator did not automatically reject the Agency's penalty. Rather, he decided that it was appropriate, on the facts of this case, to reduce the penalty to penalize the Agency for its "pervasive failure" to comply with the important due process requirements of the agreement (Pet. App. 38a). In affirming the award, the court of appeals also stressed that the particular safeguards violated were significant measures for the union and its members and that the procedural violations at issue were pervasive (Pet. App. 13a-14a).

In a recent ruling, issued after the filing of the petition here, the Federal Circuit expressly declined to impose a *per se* rule. In *Devine* v. *Brisco*, No. 83-1110 (April 27, 1984)[11] (reprinted in respondents' appendix), the court first held that the harmful error rule must always be applied; an agency and union may not negotiate a contract eliminating the rule. Second, the court refused to assume

[11]The *Brisco* opinion aptly demonstrates the value in awaiting further development of the harmful error principle in the Federal Circuit. There is nothing as yet supporting the government's arguments concerning the widespread impact the ruling below could have. Petitioner maintains (Pet. 19) that "this case may present the last clear opportunity" to challenge the Federal Circuit's harmful error rule, because that court may decline to exercise its discretionary review in other such cases. We are unaware, however, of any case where that court has declined review, regardless of the status of the legal principles involved. Moreover, there is no apparent reason why the government could not petition for writ of certiorari in any case where the Federal Circuit denies discretionary review and then seek full review in this Court of the Federal Circuit's harmful error standard.

that a procedural violation of the contract constituted harmful error. The union must establish the harm to the arbitrator's satisfaction, in order to invoke the holding in the instant case.

Thus, it is abundantly clear that the lower level court does not apply a *per se* rule. Rather, it merely allows an arbitrator to enforce important contractual due process provisions that are important to all unit employees, where there have been substantial or pervasive violations.

5. Finally, petitioner vociferously complains that the ruling below allows a different harmful error rule in arbitration proceedings, which are available to members of collective bargaining units, than in MSPB proceedings,[12] which constitute the only review available to non-unit members. According to petitioner (Pet. 10, 18-19), this difference mandates "disparate" and "inequitable" treatment, depending on union representation, and will result in improper forum shopping for bargaining unit members who have a choice between arbitration and MSPB proceedings.

First, we emphasize that Congress obviously contemplated different procedural opportunities and protections for federal employees, depending on bargaining unit membership. In permitting federal employees to negotiate procedural aspects of disciplinary actions and providing for arbitration of such actions, Congress bestowed different procedural rights to bargaining unit employees. Thus, it is of no moment that federal employees who are not represented by unions will have fewer procedural protections than those who are so represented. Such distinc-

[12]The MSPB has defined harmful error as (5 C.F.R. 1201.56(c)(3)):

> Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

tions are not impermissible, but rather were wholly contemplated by Congress.

Second, the application of a more inclusive harmful error standard in arbitration proceedings, in particular, does not violate Congressional intent. Congress did impose the same statutory standards and burdens of proof on the MSPB and on arbitrators when deciding adverse action cases, in order to "promote consistency in the resolution of these issues and to avoid forum shopping" by unit members, who have a choice of procedures. H.R. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978). But this purpose is adequately served by the lower court's decision to *apply* the harmful error rule in arbitration proceedings (Pet. App. 11a). For all the reasons discussed above, important contractual rights should be enforced in arbitration proceedings. Because of this fact, arbitrators should not be limited by the MSPB's narrow interpretation of the harmful error standard. In other words, as the lower court recognized (Pet. App. 13a), "adverse action arbitrations 'are statutorily required to be similar to MSPB hearings in some respects but in other respects may be different,'" quoting *Otherson* v. *INS*, 711 F. 2d 267, 273 (D.C. Cir. 1983).

The protection of a collective bargaining agreement and availability of arbitration procedures are major benefits of union membership--benefits that are obviously not available to non-bargaining unit members. As the D.C. Circuit aptly stated in *Devine* v. *White, supra*, government managers, who are "competent to look out for the government's interests," must be bound by their agreements. "Eroding the safeguards that these managers concede to employees in the collective bargaining process by applying MSPB's monolithic 'harmful error' standard would thus be inconsistent with Congress' desire to ensure that the federal government, as well as the private sector, received the benefits that flow from collective bargaining." 697 F.2d at 443 (footnotes and citations omitted.)

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

LOIS G. WILLIAMS
Director of Litigation

KERRY L. ADAMS
Assistant Director of Litigation

RICHARD S. EDELMAN
Assistant Counsel

June 1984

REPLY

BRIEF

Office - Supreme Court, U.S.
FILED
AUG 28 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1673 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

ALLISON E. NUTT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

23pp

TABLE OF CONTENTS

Page

Appendix A 1a

Appendix B 4a

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 5

Barrentine v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 5

BATF v. *FLRA*, No. 82-799 (Nov. 29, 1983) 10

Carter v. *Kurzejeski*, 706 F.2d 835 8

Council of Prisons, Local 1286 v. *United States Department of Justice*, No. 82-3177 (6th Cir. July 9, 1984) 6

Department of Air Force, 14 F.L.R.A. 390 8

Devine v. *Brisco*, 733 F.2d 867 3

Devine v. *Duff*, No. 83-1409 (Fed. Cir. July 2, 1984) 3

Devine v. *Lubic*, No. 84-540 (Fed. Cir. Apr. 17, 1984) 3

Devine v. *Pastore*, 732 F.2d 213 4

Devine v. *White*, 697 F.2d 421 ..... 1, 2, 3, 4

Internal Revenue Service, 3 F.L.R.A. 479 8

Page

Cases—Continued:

Lindahl v. *OPM*, cert. granted, No. 83-5954 (June 18, 1984) 2

Lodge 2424, Int'l Ass'n of Machinists v. *United States*, 564 F.2d 66 5

Norfolk Naval Shipyard, 4 F.L.R.A. 686 8

Steelworkers v. *American Mfg. Co.*, 363 U.S. 564 4

Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 ..... 4, 5

Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 ..... 4, 5

Textile Workers v. *Lincoln Mills*, 353 U.S. 448 4

United States v. *Clark*, 454 U.S. 555 2

W.R. Grace & Co. v. *Local Union 759, Int'l Union of United Rubber Workers*, No. 81-1314 (May 31, 1983) 5

Statutes and regulation:

Civil Service Reform Act of 1978, Tit. VII, 5 U.S.C. 7101 *et seq.* 2

5 U.S.C. 7101(a)(1) 6

5 U.S.C. 7116(d) 6, 7, 8, 9

5 U.S.C. 7121(e)(1) 6, 7

5 U.S.C. 7701(c)(2) 5

Page

Statutes and regulation—Continued:

Federal Courts Improvement Act of 1982, 28 U.S.C. 1295(a)(9) 2

Exec. Order No. 11,491, 3 C.F.R. 191 (1969), as amended, *reprinted in* 5 U.S.C. 7101 note 5

Miscellaneous:

H.R. Rep. 95-1717, 95th Cong., 2d Sess. (1978) 3

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1673

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

ALLISON E. NUTT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

Although respondents and amicus, the National Treasury Employees Union, have argued at length concerning the merits of the issue raised by this case, they have offered no persuasive reason why the Court should not grant the petition in order to resolve the important question presented here.

1. Respondents contend that review by this Court is inappropriate because there is not, nor will there develop, any conflict among the courts of appeals concerning the question presented.[1] But, as respondents acknow-

---

[1]Respondents (Br. in Opp. 11-12, 25) and amicus (Br. 6; but see *id.* at 9) make much of the alleged "unanimity" of views expressed by the District of Columbia Circuit in *Devine* v. *White*, 697 F.2d 421 (1983), and the court below. But the rationales of the two courts can hardly be characterized as consistent. In *Devine* v. *White*, the District of Columbia Circuit held (697 F.2d at 443; emphasis added) that an arbitrator

ledge,[2] this case presents a question of paramount importance to the operation of the comprehensive scheme for processing federal employee adverse action appeals established in the Civil Service Reform Act of 1978 (CSRA), Tit. VII, 5 U.S.C. 7101 *et seq.*, and the decision below, if permitted to stand, will result in substantially disparate treatment of the two halves of the federal workforce. These considerations fully justify review by this Court notwithstanding the fact that this issue can arise only in the Federal Circuit in the future. See, *e.g.*, *Lindahl* v. *OPM*, cert. granted, No. 83-5954 (June 18, 1984); *United States* v. *Clark*, 454 U.S. 555 (1982).

---

could set aside adverse action on account of an agency's violation of a procedural guarantee contained in the collective bargaining agreement even though the grievant's rights had not been prejudiced by the violation because "some bargained-for procedural rights are, by definition, substantial rights *of an employee*." By contrast, the rationale of the court below was that an arbitrator could set aside agency action on account of procedural error not harmful to the grievant because such procedural violations could be harmful *to the union*. (We did not seek this Court's review of the decision in *Devine* v. *White* because, as of October 1, 1982, the Federal Courts Improvement Act of 1982, 28 U.S.C. 1295(a)(9), transferred exclusive jurisdiction of appeals from adverse agency action from the District of Columbia Circuit to the Federal Circuit.)

[2]As we noted in our petition (at 18), all of the entities involved in the proceedings below agreed that this is a case of exceptional systemic importance. The Union now represents (Br. in Opp. 7 n.6) that it suggested to the court of appeals that a hearing en banc would be appropriate "primarily" because a three-judge panel of the court of appeals had denied its motion seeking dismissal of petitioner's appeal as untimely. A review of respondents' suggestion for hearing in banc (App., *infra*, 1a-3a) reveals, however, that one of the issues respondents expressly described as "highly significant" was "the authority of an arbitrator under the [Civil Service Reform Act] to mitigate agency-imposed penalties in adverse action arbitrations, as well as the factors relevant to arbitral considerations of the penalty" (*id.* at 2a).

In addition, subsequent action by the Federal Circuit has made clear that there is no need to await further development or explication of the question presented by this case. In *Devine* v. *Brisco*, 733 F.2d 867, 872 (1984), that court unequivocally reaffirmed its view that "[t]he harmful error rule is not * * * limited in applicability to situations where employees are prejudiced, but extends to instances where a union can show violations tantamount to harmful error to itself."[3]

2. Respondents (Br. in Opp. 16; emphasis by respondents) and amicus (Br. 11-12) assert that by our reliance (Pet. 14; quoting H.R. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978)), on Congress's express intention " 'to promote consistency in the resolution of these issues, and to avoid forum shopping' " we are contending "not only that arbitrators are bound to follow the statutory standards of proof so as to avoid such differing standards from one forum to another but also, erroneously, that *any* difference in the two types of proceedings should not be tolerated."

This grossly mischaracterizes our position. It is evident that Congress would have had no reason to afford bargaining unit members a choice between an appeal to the MSPB or invocation of grievance-arbitration procedures had it not contemplated that there would be some differences between the two types of proceedings.[4] Nevertheless, the legislative

---

[3]Subsequent Federal Circuit case law also substantiates our view (Pet. 19) that that court will decline to exercise its discretionary jurisdiction to entertain appeals where the question presented involves merely the application of previously settled law to particular facts. See *Devine* v. *Lubic*, No. 84-540 (Apr. 17, 1984), slip op. 3 (order); *Devine* v. *Duff*, No. 83-1409 (July 2, 1984), slip op. 4-5 (dictum). Particularly in view of *Devine* v. *Brisco*, *supra*, it is highly unlikely that the Federal Circuit would exercise its discretionary jurisdiction to consider another case presenting the "harmful error" issue.

[4]The District of Columbia Circuit recognized arbitration as "faster, cheaper, less formal, more responsive to industrial needs, and more conducive to the preservation of ongoing employment relations." *Devine* v. *White*, 697 F.2d at 435.

history requires that, in view of the outcome-determinative nature of the harmful error rule, it not be applied in a disparate fashion by the MSPB and by arbitrators. Our position is bolstered by *Devine* v. *Pastore*, 732 F.2d 213 (1984), rendered by the D.C. Circuit subsequent to *Devine* v. *White*, 697 F.2d 421 (D.C. Cir. 1983), on which both respondents and amicus rely heavily. In *Pastore*, the court of appeals overturned a decision of an arbitrator setting aside agency action on the ground that the arbitrator had applied a more rigorous standard of review than the MSPB would have applied (732 F.2d at 216; citations omitted; emphasis added):

> While undoubtedly hoping to encourage employee selection of the grievance-arbitration process, Congress did not wish that choice to be made on the basis of a predictable difference in substantive outcome. To the contrary, it envisioned a system that would, as between arbitration and MSPB procedures, "promote consistency . . . and . . . avoid forum shopping." This Court has previously noted that *substantial disuniformity between the review powers of arbitrators and of the MSPB would frustrate congressional intent.*

Likewise, in view of the "predictable difference in substantive outcome" resulting from the application vel non of the harmful error rule, the controlling legislative history requires that the rule be applied in the same way by both the MSPB and arbitrators.

3. Respondents also contend that, in view of the federal policy favoring arbitration of labor disputes articulated in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), and the tradition of deference to arbitral decisions enunciated in the *Steelworkers Trilogy*,[5] the arbitrator's award in this case

[5] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

should be accorded finality because it " 'draws its essence from the collective bargaining agreement' " (Br. in Opp. 20; quoting *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). Respondents' reliance on this "common law" tradition of deference is misplaced in the context of this case, however, because the error of the arbitrator occurred not in his construction of the terms of the collective bargaining agreement, but rather in his ignoring a controlling aspect of external, federal law — the harmful error rule of 5 U.S.C. 7701(c)(2).

"[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). See also *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960). Hence, the authorities on which respondents rely do not require that any special deference be afforded an arbitrator's decision that does not properly apply the harmful error rule established by Congress. To the contrary, it is well established that an arbitral award that violates external law is unenforceable in federal court. See *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber Workers*, No. 81-1314 (May 31, 1983), slip op. 8-9.[6]

4. Respondents contend that a construction of the harmful error rule that requires a showing of prejudice *to the employee* denigrates the role Congress intended unions to play in the federal sector labor-management scheme. At the

[6] A deference argument based on the *Steelworkers Trilogy* similar to that advanced by respondents here was squarely rejected by the Court of Claims at the time when federal sector labor arbitration was governed by Exec. Order No. 11,491, 3 C.F.R. 191 (1969), as amended, *reprinted in* 5 U.S.C. 7101 note. *Lodge 2424, Int'l Ass'n of Machinists* v. *United States*, 564 F.2d 66, 72 (1977).

outset we note, as the Sixth Circuit did in *Council of Prisons, Local 1286* v. *United States Department of Justice*, No. 82-3177 (July 9, 1984), slip op. 7 n.7 (emphasis by the court), that "Section 7101 [5 U.S.C. 7101(a)(1)] identifies, after all, the 'statutory protection of the right of *employees*,' not their exclusive representatives, as the imperative adopted by Congress." Nevertheless, *Council of Prisons* also acknowledged (slip op. 5) that "[t]he [Civil Service Reform Act] recognizes a duality of interest among employees and the Union." As we discussed in our petition (at 16-17), the Act effectuates this duality of interest by assigning distinct remedial procedures to employees and to unions. Respondents argue, however, that the Union's rights were appropriately enforced in this adverse action proceeding because, under 5 U.S.C. 7116(d) and 7121(e)(1), the employees' election to pursue their rights through the negotiated grievance procedures foreclosed the Union from obtaining a remedy in any independent action (*e.g.*, either a grievance or an unfair labor practice proceeding) in its institutional capacity. Respondents' argument is plainly wrong.

None of the authorities on which respondents rely resembles the present case — in which the Union is attempting to enforce its independent institutional rights in an employee's adverse action proceeding. Moreover, respondents' argument fails to come to grips with the thrust of our position — that, while a union remains free to attempt to vindicate its *independent* rights notwithstanding prior action by the employee, an error violative of the *union's* rights that in no way prejudiced the *employee* should not redound to the benefit of the concededly blameworthy *employee*. Respondents' efforts to justify rejection of this common sense conclusion are unpersuasive.

Respondents argue first (Br. in Opp. 21) that because "multiple appeals based on the same facts in different forums" are prohibited by 5 U.S.C. 7121(e)(1), the Union's

rights could only be vindicated in the instant adverse action proceeding. Section 7121(e)(1), however, deals solely with the requirement that an *employee* must elect between proceeding under a statutory appeal procedure and a negotiated grievance procedure (emphasis added):

> Matters covered under sections 4303 and 7512 of * * * the negotiated grievance procedure may, *in the discretion of the aggrieved employee* be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. * * * *An employee* shall be deemed to have exercised *his option* under this subsection * * *.

Accordingly, 5 U.S.C. 7121(e)(1) does not prohibit the *union* from pursuing a remedy *in its institutional capacity* based on issues arising from the same factual situation that gave rise to the employee's adverse action.

There also is nothing in the language of 5 U.S.C. 7116(d) that warrants the conclusion that an election by an *employee* to pursue a particular procedural scheme forecloses a *union* from filing an unfair labor practice charge, where appropriate. To the contrary, Section 7116(d) provides that "issues which can be raised under a grievance procedure may, in the discretion of *the aggrieved party*, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures" (emphasis added). The statutory language thus does not foreclose two distinct aggrieved parties from pursuing separate causes of action based on the same factual situation.

Nor does the legislative history on which respondents rely (Br. in Opp. 23-24) address the issue whether an *employee's* pursuit of his remedies bars the *union* from filing an unfair labor practice charge. In fact, recent decisions support our position that an employee's election does not bar the union

from filing an unfair labor practice charge in its institutional capacity. In *Department of Air Force*, 14 F.L.R.A. 390, 391-392 (1984), the Federal Labor Relations Authority (FLRA or Authority) held that 5 U.S.C. 7116(d) does not bar a *union* from pursuing an unfair labor practice charge, notwithstanding the *employee's* partially successful appeal to the MSPB. See also *Carter* v. *Kurzejeski*, 706 F.2d 835, 843 n.10 (8th Cir. 1983) (employee adverse action grievance may not bar union from proceeding before the FLRA on an unfair labor practice charge).

Rather than supporting respondents' position, the decisions on which they rely appear to endorse our view that, so long as the "aggrieved parties" are different, an election by one to proceed in one forum will not preclude the other from proceeding in a different forum. For example, in *Norfolk Naval Shipyard*, 4 F.L.R.A. 686 (1980) (Br. in Opp. 22), the grievance of the employee-union steward sought to protect his rights *as a union official*, not as an employee. Thus, it was because the actual "aggrieved party" in the grievance proceeding was the union that the union's subsequent unfair labor practice charge brought in its institutional capacity was barred. Similarly, in *Internal Revenue Service*, 3 F.L.R.A. 479 (1980) (Br. in Opp. 22), the Authority held that an employee's grievance barred a union's subsequent unfair labor practice proceeding because in both proceedings the union had requested the information solely on behalf of the employees for use in their disciplinary actions.[7] Hence, neither case cited by respondents is authority for the proposition that significant *independent* interests of a union must be effectuated in the context of an employee adverse action proceeding because there is no other available avenue for their enforcement.

---

[7]In holding that this identity of interest precluded the filing of an unfair labor practice charge following the submission of an employee's grievance, the administrative law judge expressly distinguished the situation in which a union requests information in its institutional capacity. See 3 F.L.R.A. at 483 n.1.

Finally, respondents erroneously contend (Br. in Opp. 22) that the facts of the present case demonstrate that Section 7116(d) precludes the processing of an unfair labor practice charge by a union when a grievance or statutory appeals procedure concerning the same matter has been initiated by an employee. By quoting (Br. in Opp. 22-23) only a portion of a letter issued on April 30, 1982, by Marjorie K. Thompson, FLRA Acting Regional Director (App., *infra*, 4a-8a), respondents misrepresent the Authority's disposition of the unfair labor practice charge filed by the Union in this case.

Contrary to respondents' suggestion (Br. in Opp. 22-23), Thompson's refusal, on behalf of the FLRA, to issue an unfair labor practice charge based on the agency's failure to advise the grievants in this case of their right to representation during interrogation was not because of the pendency of a grievance raising the same issue. Rather, Thompson's refusal was grounded on her "conclu[sion] that the dispute in this case involves differing and arguable interpretations of the contracts' intent and meanings, and should therefore appropriately be resolved through the parties' negotiated grievance/arbitration procedures, rather than in the unfair labor practice forum" (App. *infra*, 6a).[8]

---

[8]As we noted in our petition (at 17), the filing of an unfair labor charge is appropriate only where there has been a clear and patent breach of the collective bargaining agreement.

Furthermore, Thompson's April 30, 1982 letter on which respondents rely was issued in advance of the employees' grievances filed June 1, 1982. For this reason as well, Thompson's refusal to issue an unfair labor charge could not have been based on the pendency of an outstanding employee grievance. Finally, we are advised that the Authority did assume jurisdiction and issue a complaint on one of the other unfair labor practice charges mentioned in the arbitrator's decision and award, *i.e.*, the "gag order" (Pet. App. 27a). This complaint ultimately was settled pursuant to the Authority's approval.

5. In sum, nothing in respondents' or amicus's briefs rebuts our basic contention that the decision below warrants review. The Civil Service Reform Act of 1978 established a "comprehensive revision of the laws governing the rights and obligations of civil servants [and] contains the first statutory scheme governing labor relations between federal agencies and their employees" (*BATF* v. *FLRA*, No. 82-799 (Nov. 29, 1983), slip op. 2); the basic rules that will govern these relations for the foreseeable future are now being determined. The court of appeals' decision, affecting millions of employees, should not be the final word on this matter, because it plainly frustrates congressional intent to avoid forum shopping and to ensure that the two halves of the federal workforce are not treated in a disparate manner with respect to discipline.

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

AUGUST 1984

DOJ-1984-08

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DONALD J. DEVINE, Director, Office of Personnel Management, Petitioner, v. ALLISON E. NUTT, Arbitrator, *et al.*, Respondents.	No. 83-589

SUGGESTION OF RESPONDENTS FOR HEARING IN BANC

Pursuant to Federal Rule of Appellate Procedure 35(b), respondents in the above-captioned case hereby suggest that this case be heard in banc. In support of this suggestion respondents state the following:

1. A hearing in banc, although not favored, is appropriate when, as in this case, the proceeding involves a question of exceptional importance. This appeal involves a review of an arbitrator's decision in an adverse action case arising under the Civil Service Reform Act of 1978 (CSRA). The case poses, for the first time in the Federal Circuit, several highly significant issues focused on the propriety of judicial review of arbitrators' decisions in the federal sector. These issues, respondents believe, constitute a question of exceptional importance because their resolution by this

Court will define the parameters of arbitrators' authority in the federal sector under the CSRA and the degree to which judicial action will henceforth encroach on the arbitral process.

In particular, and for the first time, this Court clearly faces in this case questions concerning: (1) the circumstances under which the Director of the Office of Personnel Management (OPM) may seek judicial review of an arbitrator's decision; (2) whether the Director must or may first request "reconsideration" of an arbitrator's award before seeking judicial review; (3) the time limits on petitions for judicial review of an arbitrator's award; (4) the authority of an arbitrator under the CSRA to mitigate agency-imposed penalties in adverse action arbitrations, as well as the factors relevant to arbitral considerations of the penalty; (5) the reviewability of an arbitrator's decision; and (6) the amount of deference that is due arbitral decisions involving adverse actions under the CSRA.

2. Only two cases prior to this case have addressed at all the above-enumerated issues: *Devine v. Goodstein*, 680 F.2d 243 (D.C. Cir. 1982) and *Devine v. White*, 697 F.2d 421 (D.C. Cir. 1983). Under 5 U.S.C. § 7703(d), as amended by Pub. L. No. 97-164, 96 Stat. 45 (1982), all petitions for review of arbitrators' decisions are henceforth to be filed with this Court. Thus, the decision of this Court herein will set the future policy for judicial review of federal sector arbitral awards.

3. In its order of April 12, 1983, a panel of this Court ruled in this case that the Director of OPM must seek reconsideration of an award with the arbitrator prior to filing a petition for review with this Court. Thus, the second question posed in para. 1 above has been answered by this Court and by the D.C. Circuit in directly conflicting decisions. *See Devine v. White, supra*, at 433.

4. The above-outlined reasons for this suggestion are consistent with the Supreme Court's indication in *U.S. v. American Foreign Steamship Corp.*, 363 U.S. 685, 80 S. Ct. 1336 (1960) that in banc courts are to be convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit, and that the function of such in banc courts is that of determining "the major doctrinal trends of the future for the respective circuits."

For the foregoing reasons, respondents respectfully suggest that this case be heard by the Court in banc.

Respectfully submitted,

Charles A. Hobbie
Staff Counsel

James R. Rosa
General Counsel
American Federation of
Government Employees, AFL-CIO
1325 Massachusetts Avenue, NW
Washington, DC 20005
(202) 737-8700

APPENDIX B

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

REGION VII, DENVER
1531 STOUT STREET, SUITE 301
DENVER,COLORADO 80202

April 30, 1982

Florence H. Morscher, Regional VP
AFGE, AFL-CIO, Council 236
P. O. Box 25365, Denver Federal Center
Denver, CO 80225

Re: Case Nos. 7-CA-20172, 7-CA-20173 and 7-CA-20206 General Services Administration & GSA, Region 8, and American Federation of Government Employees, AFL-CIO, Council 236 & Local 3275

Dear Ms. Morscher:

The captioned cases, alleging violations of Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, have been investigated and carefully considered.

The charges allege the following violative acts: *Case No. 7-CA-20172* — that on February 4, 1982, agents of the General Services Administration (GSA) patently breached the applicable collective bargaining agreement by failing to advise unit employees during an interrogation of their right to have a Union representative present; *Case No. 7-CA-20173* — that on or about February 4, 1982, agents of the GSA: (1) instituted a new personnel practice or policy without notice to or negotiation with the Union, in that unit employees under investigation were "coerced" into taking

annual leave after they had been placed on administrative leave, (2) breached the collective bargaining agreement by placing certain employees on forced overtime without prior notice to the Union, and (3) violated the Statute by putting all unit employees who were investigated under a "gag order," thereby precluding them from talking to Union representatives; *Case No. 7-CA-20206* — that on or about February 21, 1982, agents of the GSA violated the Statute and the collective bargaining agreement by instituting new tours of duty without providing advance notice or an opportunity to negotiate to the Union.

The investigation disclosed that, beginning on or about February 4, 1982, and continuing through February 8, 1982, agents of the GSA's Office of Inspector General (OIG) individually interrogated several Federal Protective Officers (FPOs) concerning numerous on-the-job improprieties allegedly committed by those employees, all of whom were regularly working on the midnight shift at that time. It is undisputed that during these interrogations no unit employee requested Union representation and that the OIG investigators advised none of the employees of any right to representation. Further, at the end of each interview the employees were told that if they discussed the interview with anyone they would face criminal charges of obstruction of justice.

Several of the employees under investigation were placed on forced administrative leave, but were later advised by their supervisor that they had the option of taking annual leave, and could thereby avoid having a letter concerning the matter placed in their files.

During the interrogation of the unit employees on February 4, 1982, certain FPOs who had been working the earlier shift were held over on overtime to cover the shifts of those

officers being questioned, and other FPOs who were not scheduled for work until the succeeding shift were called in early to relieve the on-duty officers.

Thereafter, on or about February 21, 1982, the GSA revised the tour of duty schedule for the FPOs who had been the subject of the OIG investigation. This schedule revision was implemented about a month earlier than the usual 90-day tour rotation, and its also broke up the existing shift teams, which had in the past normally rotated to different tours as a team (*i.e.*, intact).

With respect to *Case No. 7-CA-20172,* the evidence establishes that at all times pertinent to this case, the Union and the GSA were parties to a collective bargaining agreement effective March 2, 1978. Also in existence is a document entitled Supplement #1, effective April 2, 1980. On February 16, 1981, an arbitrator interpreted Article XXVII, Section 2, of the 1978 agreement to require the Employer to advise unit employees being interrogated of their right to Union representation. The arbitrator also cited in his opinion Article XXVII of the 1980 agreement, which covers the same subject matter as the 1978 agreement, but which does not contain the broad advisement requirement of the earlier agreement. The parties differ as to whether the supplement's Article XXVII supersedes or merely clarifies or adds language to the earlier contract, and as to whether or not the arbitrator's opinion interpreting language in the 1978 version of Article XXVII is applicable to the language of the 1980 contract. Under these circumstances, I conclude that the dispute in this case involves differing and arguable interpretations of the contracts' intent and meanings, and should therefore appropriately be resolved through the parties' negotiated grievance/arbitration procedures, rather than in the unfair labor practice forum.

With respect to *Case No. 7-CA-20173,* I have determined that, absent settlement, a Complaint and Notice of Hearing will issue on those portions of this charge alleging that the GSA Inspector General agents issued an overly broad order to unit employees barring them, under threat of criminal prosecution, from talking to anyone about their interviews, and that portion of the charge dealing with the unilateral issuance of the administrative leave letters, without providing the Union an opportunity to bargain on the impact of placing employees on forced leave.

With respect to the allegation in Case No. 7-CA-20173 concerning a change in the policy or practice concerning mandatory overtime, the evidence shows that Article IX, Section 4, of the collective bargaining agreement covers overtime for unit employees. The evidence also demonstrated that the actions of the GSA in holding over personnel on overtime to cover the under-manned shift was in accord with its past practice in similar situations where a personnel shortage occurred. Further, the language of the aforementioned contract arguably gives the GSA the right to compel overtime for unit employees under these circumstances. As noted previously, differing and arguable interpretations of contractual language are appropriately resolved through the procedures negotiated by the parties for that purpose. Accordingly, I find no merit to this aspect of the charge.

With respect to *Case No. 7-CA-20206,* I find that Article IX, Section 3, of the collective bargaining agreement is susceptible to good faith differing and arguable interpretations of the type of notification required prior to a tour of duty change. The Charging Party produced no evidence of any past practice or understanding to support its contention that notice to the Union was required prior to a tour change. In addition, the Agency asserts that the tour of duty and

shift personnel changes are temporary ones necessitated by the criminal investigation in this case and that, therefore, under Section 3 of the Article, no notice to or negotiation with the Union was required. Without deciding the merits of that assertion, I find it to be an arguable interpretation of the contract language in question and, as such, more properly reviewable under the negotiated grievance procedures.

Under all of these circumstances, I conclude that further proceedings in Case No. 7-CA-20172, Case No. 7-CA-20206, and that portion of Case No. 7-CA-20173 which concerns the ordering of mandatory overtime are not warranted. Accordingly, I am refusing to issue a complaint in those matters. Under the circumstances, I find further that the issuance of a temporary restraining order in these cases is not warranted.

Pursuant to Section 2423.10(c) of the Rules and Regulations of the Authority, you may obtain a review of this decision not to issue a complaint by filing an appeal with the General Counsel. A copy of the appeal shall also be filed with this office. In addition, you should notify all other parties of the fact that this action has been taken.

Such appeal must contain a complete statement setting forth the facts and reasons upon which it is based and must be received by the General Counsel of the Federal Labor Relations Authority, 500 "C" Street, SW, Washington, D.C. 20424, not later than the close of business May 31, 1982.

Sincerely,

Marjorie K. Thompson
Acting Regional Director

Attachment: Service Sheet

PETITIONER'S

BRIEF

(5)

Office-Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1673

In the Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

ALLISON E. NUTT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

DAVID M. COHEN
GEORGE M. BEASLEY, III
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

37pp

QUESTION PRESENTED

The Civil Service Reform Act of 1978, 5 U.S.C. 7701(c)(2)(A), empowers the Merit Systems Protection Board to set aside adverse agency action taken against a federal employee if the employee can show that a procedural error committed by the agency caused substantial prejudice to his rights. The question presented is whether the statute requires a different "harmful error" rule to be applied when a federal employee who is a member of a bargaining unit seeks review of adverse agency action before an arbitrator.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the General Services Administration and the American Federation of Government Employees, AFL-CIO, Local 3275, were respondents in the court of appeals. Thomas Rogers and Robert Wilson, Jr., were the grievants in the arbitration proceedings.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory and regulatory provisions involved	2
Statement	3
Summary of argument	10
Argument:	
An arbitrator may set aside adverse agency action taken against a federal employee because of procedural error only when that error might have affected the agency's decision	13
A. An error is harmful within the meaning of the Civil Service Reform Act only if it prejudices the individual employee	14
B. The court of appeals' approach runs counter to congressional intent by encouraging forum shopping and inconsistent decisions in adverse action proceedings	20
C. A union may not assert violations of its procedural rights in the context of an individual employee's challenge to adverse agency action	22
Conclusion	30

TABLE OF AUTHORITIES

Cases:

AFGE, Local 1286 v. *United States Department of Justice*, 738 F.2d 742	22, 25
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36	17
American Federation of Government Employees, Local 1923 v. *Federal Labor Relations Authority*, 675 F.2d 612	27
Battaglia v. *Department of Health & Human Services*, 5 M.S.P.B. 212	15

Cases—Continued: Page

Brewer v. *United States Postal Service*, 647 F.2d 1093, cert. denied, 454 U.S. 1144 21
Brown v. *GSA*, 425 U.S. 820 28
Bureau of Alcohol, Tobacco & Firearms v. *Federal Labor Relations Authority*, No. 82-799 (Nov. 29, 1983) 13, 29, 30
Carter v. *Kurzejeski*, 706 F.2d 835 ..... 25, 26
Cheney v. *Department of Justice*, 720 F.2d 1280.. 21
Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (Jun. 25, 1984) 16
Davies v. *Department of the Navy*, 4 M.S.P.B. 8[illegible].. 15
Department of Air Force, 14 F.L.R.A. 390 25
Devine v. *Brisco*, 733 F.2d 867 ..... 17, 19, 28
Devine v. *Goodstein*, 680 F.2d 243 17
Devine v. *Pastore*, 732 F.2d 2[illegible]3 ..... 17, 21
Devine v. *White*, 697 F.2d 421 ..... 5, 17
Food Safety & Quality Service, 7 F.L.R.A. 665 26
Fuiava v. *Department of Justice*, 3 M.S.P.B. 217.. 15
Geisler v. *Department of Transportation*, 3 M.S.P.B. 367, aff'd, 686 F.2d 844 ..... 15, 20
Internal Revenue Service, 9 F.L.R.A. 480 25
Iowa National Guard & National Guard Bureau, 8 F.L.R.A. 500 ..... 12, 26
Kotteakos v. *United States*, 328 U.S. 750 28
McDonough Power Equipment, Inc. v. *Greenwood*, No. 82-958 (Jan. 18, 1984) 28
Miguel v. *Department of the Army*, 727 F.2d 1081.. 21
Parker v. *Defense Logistics Agency*, 1 M.S.P.B. 489 ..... 14, 15
Ryder v. *United States*, 585 F.2d 482 24
Schramm v. *Department of Health & Human Services*, 682 F.2d 85 19
Shaw v. *United States Postal Service*, 697 F.2d 1078 21
Stalkfleet v. *United States Postal Service*, 6 M.S.P.B. 536 ..... 10, 15, 20
Stankis v. *EPA*, 713 F.2d 1181 19
United States v. *Hasting*, No. 81-1463 (May 23, 1983) 16

Cases—Continued: Page

United States Air Force, 4 F.L.R.A. 512 25
W.R. Grace & Co. v. *Local Union 759, Int'l Union of United Rubber Workers*, No. 81-1314 (May 31, 1983) 17
Weiss v. *United States Postal Service*, 700 F.2d 754 19

Statutes and regulation:

Civil Service Reform Act of 1978, 5 U.S.C. 2301 *et seq.* 5
5 U.S.C. 4303(e) 5
5 U.S.C. 7101(a)(1) 13
5 U.S.C. 7101(b) 13, 29, 30
5 U.S.C. 7103(a)(9)(C)(i) 25
5 U.S.C. 7106(b)(2) 29
5 U.S.C. 7106(b)(3) 29
5 U.S.C. 7114(a)(2)(B) 6
5 U.S.C. 7116(d) 12
5 U.S.C. 7121(b)(3)(A) 12, 25
5 U.S.C. 7121(b)(3)(C) 23
5 U.S.C. 7121(e)(1) 5, 11, 20, 21, 23
5 U.S.C. 7121(e)(2) 2, 6, 10, 16
5 U.S.C. 7121(f) 12, 17, 23, 27
5 U.S.C. 7122(a) 27
5 U.S.C. 7123(a) 27
5 U.S.C. 7123(a)(1) 27
5 U.S.C. 7513(d) 5
5 U.S.C. 7701 ..... 5, 15
5 U.S.C. 7701(a)(1) 29
5 U.S.C. 7701(c) 2, 12, 23
5 U.S.C. 7701(c)(1) 16
5 U.S.C. 7701(c)(1)(A) 6
5 U.S.C. 7701(c)(1)(B) 6
5 U.S.C. 7701(c)(2) 16, 17, 19, 23
5 U.S.C. 7701(c)(2)(A) 6, 8, 10, 12, 13, 14, 23
5 U.S.C. 7701(j) 14
5 U.S.C. 7703 12
5 U.S.C. 7703(a)(1) 23, 27
5 U.S.C. 7703(d) 8

Statutes and regulations—Continued: Page

28 U.S.C. 1295(a)(9) 8, 27
31 U.S.C. 1349(b) 9
5 C.F.R.:
Section 1201.56(b)(1) 14
Section 1201.56(c)(3) 3, 10, 15, 18, 19

Miscellaneous:
F. Elkouri & E. Elkouri, *How Arbitration Works* (3d ed. 1973) 25
H.R. Rep. 95-1717, 95th Cong., 2d Sess. (1978) 8, 11, 16, 17, 20
OPM, *Federal Personnel Manual Bulletin No. 711-89* (Dec. 1, 1983) 21
Office of Policy and Communication, OPM, *Union Recognition in the Federal Government* (1983) 21
S. Rep. 95-969, 95th Cong., 2d Sess. (1978) 10, 16, 17, 19, 20, 24, 28, 29

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1673

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

ALLISON E. NUTT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 718 F.2d 1048. The order of the court of appeals denying respondents' motion to dismiss (Pet. App. 17a-20a) is unreported. The arbitration decision and award of respondent Nutt and his revised award (Pet. App. 21a-39a, 40a-41a) also are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a) was entered on September 22, 1983. A petition

for rehearing was denied on November 18, 1983 (Pet. App. 43a). On February 10, 1984, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 16, 1984. The petition was filed on April 13, 1984 and was granted on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

5 U.S.C. 7701(c) provides in pertinent part:

> (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—
>
> (A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.
>
> (2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—
>
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision * * *.

5 U.S.C. 7121(e)(2) provides:

> In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

5 C.F.R. 1201.56(c)(3) defines "harmful error" as:

> Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

STATEMENT

1. As the court of appeals observed (Pet. App. 2a), the facts of this case "do not provide an example of model conduct by government employees." During January 1982, Thomas Rogers and Robert Wilson, Jr. (the grievants) were employed by the General Services Administration (GSA or the Agency) as Federal Protective Service (FPS) officers at the Denver Federal Center i.. Denver, Colorado (*id.* at 2a, 23a). On January 7, 1982, Rogers, while on patrol in a government vehicle, drove to his home in a nearby suburb and picked up several cans of beer at his supervisor's request.[1] Rogers then returned to the FPS command center and delivered the beer to his supervisor. The supervisor drank the beer and left the empty cans at the command post when he went off duty. *Id.* at 2a-3a, 23a-25a.

The following day, the supervisor, while off duty, became concerned that the presence of the empty beer cans would lead to the discovery of his drinking at the command post. He therefore telephoned Wilson,

---

[1] The supervisor was discharged by GSA and the discharge was upheld by the Merit Systems Protection Board (Pet. 3 n.1).

who was then on duty at the command post, and instructed him to alter the monitor tapes of the previous day's telephone conversations between the command post and patrolling FPS officers to include a spurious explanation for the presence of the beer cans.[2] Wilson complied with the supervisor's request. Pet. App. 3a, 25a.

On January 25, 1982, an FPS official who was monitoring the tapes for unrelated reasons discovered irregularities that led her to believe that Wilson and the supervisor had edited the tapes to conceal the consumption of beer at the command post. As a result, special agents of GSA's Office of the Inspector General commenced an investigation of the incident. Two agents went to Rogers' home and asked him to accompany them to the local police station for a "non-custodial" interrogation. The agents subsequently interviewed Wilson in a similar fashion. Neither Rogers nor Wilson was advised that he was entitled to have a union representative present during the interview, and neither requested the presence of a representative. Pet. App. 3a-4a, 25a-27a, 33a.[3]

---

[2] The command post was equipped with tape recording equipment that recorded all radio and telephone conversations held by persons in the center (Pet. App. 24a).

[3] Article XXVII, Section 2, of the collective bargaining agreement between GSA and the grievants' union provides (Pet. App. 3a n.2):

> The Employer agrees that during formal discussion where interrogation or written or sworn statements are taken from an employee, in connection with a charge that may result in disciplinary action against him, he will have the opportunity to have a representative present. It should be understood that counseling sessions are not formal discussions.

Approximately one month later, the agents met with each of the grievants and asked them to sign affidavits prepared from notes taken by the agents during the interviews. After making substantial changes, both grievants signed the affidavits. *Id.* at 4a, 28a, 35a.

On April 2, 1982, GSA formally notified the grievants that it proposed to remove them from their positions with the Federal Protective Service. After receiving the grievants' written responses to the charges, the Agency issued a removal notice to Wilson for falsification of tape recordings and attempting to conceal activities of record. Rogers likewise received a removal notice for falsification of records, failure to report irregularities and use of a government vehicle for non-official purposes. Pet. App. 4a, 28a-29a.

2. Under the Civil Service Reform Act of 1978 (CSRA or the Act), 5 U.S.C. 2301 *et seq.*, any federal employee who is subject to "adverse agency action"—removal, suspension for more than 14 days, reduction in grade, reduction in pay or furlough of 30 days or less—may appeal to the Merit Systems Protection Board (MSPB or the Board). See 5 U.S.C. 4303(e), 7513(d), 7701. Alternatively, an employee who, like the grievants in this case, is a member of a bargaining unit may challenge adverse agency action through the grievance arbitration procedures contained in the collective bargaining agreement between his union and his employer. 5 U.S.C. 7121(e)(1); see generally *Devine* v. *White*, 697 F.2d 421, 428 (D.C. Cir. 1983).

In deciding such an appeal, the Board must, depending upon the nature of the employee's conduct, sustain agency action that is supported by substan-

tial evidence (5 U.S.C. 7701(c)(1)(A)) or a preponderance of the evidence (5 U.S.C. 7701(c)(1)(B)). When such evidence exists, however, the grievant still may prevail by "show[ing] harmful error in the application of the agency's procedures in arriving at [its] decision." 5 U.S.C. 7701(c)(2)(A). Arbitrators who judge challenges to adverse action that are brought under negotiated grievance procedures must apply these same substantive standards. 5 U.S.C. 7121(e)(2).

3. a. Both employees in this case elected to challenge their removal under the procedures established by the collective bargaining agreement between GSA and their union, respondent American Federation of Government Employees. The arbitrator (respondent Nutt) found (Pet. App. 32a) that the grievants had committed the acts alleged "and thereby substantiated [the] charges made against them sufficient under normal circumstances to justify their removal from government service." While the arbitrator also found (*id.* at 32a-34a) that the employees had not been offered the opportunity to have a union representative present during the interrogation, as required by Article XXVII, Section 2, of the collective bargaining agreement (see note 3, *supra*),[4] he observed that the grievants "were [not] entirely unaware of their right to representation during an investigative interview" (Pet. App. 34a; see *id.* at 35a). Accordingly, the arbitrator concluded (*ibid.*)

[4] The arbitrator concluded (Pet. App. 33a-34a) that while the statute (5 U.S.C. 7114(a)(2)(B)) guarantees an employee the right to have union representation at an investigative interview only if he requests it, the relevant contractual provision further required that the employee be advised of the right to representation.

that the "procedural irregularit[ies] may not have been prejudicial," so that an "emphasis upon technicalities would be inconsistent with the informal atmosphere of the arbitration process."

The arbitrator also accepted the Union's contention that the Agency violated Article XXVII, Section 3, of a supplement to the collective bargaining agreement by failing to issue the notices of proposed removal within a reasonable time after it first learned of the offenses (Pet. App. 36a-37a).[5] But he further noted (*id.* at 37a-38a) that "[t]he Union has not claimed or attempted to show that the interests of the Grievants were in any way prejudiced by the inordinate delay in issuance of the notice of adverse action * * *."

Notwithstanding his explicit findings that the grievants had committed the alleged misconduct, that the misconduct would normally justify the penalty of

[5] The relevant contract section provided (Pet. App. 5a n.4):

> PROPOSED NOTICE: In the event an employee is issued a notice of proposed disciplinary or adverse action, that employee must be afforded and made aware of all his/her rights. These proposed notices shall be served on the employee(s) within a reasonable period of time (normally 40 calendar days) after the occurrence of the alleged offense or when the alleged offense becomes known to management.

As the court of appeals noted (*id.* at 5a n.5), the arbitrator overstated the delay between the date the Agency first became aware of the grievants' offenses (February 2) and the date on which the notices of proposed removal were issued to them (April 2). The arbitrator erroneously counted the 88-day period between February 2 and May 3, the date on which the grievants responded to the notices of proposed removal, in concluding that the Agency violated the contract provision (*id.* at 36a-37a).

removal from government service, and that the procedural defaults had not prejudiced them, the arbitrator held that the grievants' removal was not for just cause "[s]olely because of the Agency's pervasive failure to comply with the due process requirements of the [collective bargaining] agreement" (Pet. App. 38a). The arbitrator therefore reduced the penalties imposed on the grievants from removal to two weeks' suspension without pay (*id.* at 38a-39a).[6]

b. The court of appeals substantially affirmed the decision and award of the arbitrator (Pet. App. 1a-16a).[7] The court acknowledged (*id.* at 10a; see also *id.* at 5a) that the violations of the collective bargaining agreement "were not personally prejudicial to grievants Rogers and Wilson." It further held, in view of Congress' express intent "to promote consistency * * * and to avoid forum shopping" (H.R. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978)), that the "harmful error" standard set out in 5 U.S.C. 7701 (c) (2) (A) must be employed by arbitrators "in deciding whether a grievant was personally prejudiced." Nevertheless, the court of appeals concluded (Pet. App. 12a) (emhpasis added)) that "the arbi-

[6] The arbitrator later issued a supplemental ruling confirming the two-week penalty (Pet. App. 40a-41a).

[7] Petitioner, the Director of the Office of Personnel Management, is entitled to seek review of an arbitration award in the Federal Circuit pursuant to 5 U.S.C. 7703(d) if he "determines, in his discretion, that [an error has been made] * * * in interpreting a civil service law, rule, or regulation affecting personnel management and that the * * * decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." See 28 U.S.C. 1295(a) (9). In this case, the court of appeals granted the petition for review, and the appeal was heard by a five-judge panel.

trator can take account of significant violations of the collective bargaining agreement, important to the union, *even though the particular grievants may not have been themselves adversely affected.*" The court explained (*id.* at 12a-14a (emphasis in original; citations omitted)):

> The union is a major (if not *the* major) party to the arbitration and its proper interests are to be protected, even though the interests of the particular grievants may not, alone, call for protection. * * *
>
> * * * * *
>
> [T]he presence in the contract of these procedural safeguards concerning representation and notice is evidence of their substantiality and importance to the union and its members covered by the agreement. They also appear, of themselves, to be significant measures for the union and its members. * * * Violations of explicit and important procedural rights contained in a contract, such as these, could fairly be said to be tantamount to "harmful error" to the union within the scope of 5 U.S.C. § 7701(c) (2) (A) (1982) for the purposes of collective bargaining arbitration in which the union is a proper party.

Accordingly, the court of appeals sustained the arbitrator's reduction of the grievants' penalties as a proper means of "penalizing the agency" (Pet. App. 14a).[8]

[8] The court of appeals agreed with petitioner in one respect. It held that the arbitrator lacked authority to mitigate Rogers' penalty below the statutorily imposed minimum of one month's suspension for the unauthorized operation of a government vehicle. 31 U.S.C. 1349(b); Pet. App. 14a-16a.

SUMMARY OF ARGUMENT

1. The Civil Service Reform Act of 1978 provides that adverse agency action may be vacated on account of procedural error only when the affected employee demonstrates that the claimed procedural violation was "harmful." 5 U.S.C. 7701(c)(2)(A). The Merit Systems Protection Board has interpreted this harmful error rule to permit reversal of adverse agency action for procedural errors or for violations of the provisions of a collective bargaining agreement only when the errors "would likely [have] affect[ed] the result of the removal action." *Stalkfleet* v. *United States Postal Service*, 6 M.S.P.B. 536, 539 (1981). See 5 C.F.R. 1201.56(c)(3). This straightforward interpretation of the harmful error requirement—which is fully applicable in the context of arbitral review of adverse agency action (see 5 U.S.C. 7121(e)(2))—serves to effectuate the congressional intent.

The decision of the court of appeals, however, eviscerates the rule in the context of arbitral proceedings. By allowing an arbitrator to "take account of significant violations of the collective bargaining agreement, important to the union, *even though the particular grievants may not have been themselves adversely affected*" (Pet. App. 12a (emphasis added)), the decision below disregards the stautory language and the MSPB's binding definition of harmful error. The decision thus flies in the face of Congress's attempt to "streamline[] the process for dismissing and disciplining federal employees." S. Rep. 95-969, 95th Cong., 2d Sess. 2 (1978).

2. The court of appeals' decision also frustrates Congress's intent "to promote consistency in the resolution of [adverse action challenges], and to avoid

forum shopping." H.R. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978). It is within "the discretion of the aggrieved employee" (5 U.S.C. 7121(e)(1)) to choose the forum for a challenge to adverse action. Yet if an arbitrator, unlike the Board, is free to grant relief to employees who have not been personally prejudiced by a procedural error, a bargaining unit employee would be foolish to seek review by the MSPB, rather than through a negotiated grievance procedure. As a result, entirely different standards of review will be applied to the two portions of the federal workforce. The 39% of federal employees who are not represented by unions will be able to challenge adverse agency action on account of procedural error only if they can demonstrate that, in the absence of the error, the agency might have reached a different result; the 61% of federal employees who are bargaining unit members will not be required to make such a showing.

3. The court of appeals' erroneous ruling rests entirely on its conclusion that "[t]he union is a major (if not *the* major) party to the arbitration and its proper interests are to be protected, even though the interests of particular grievants may not, alone, call for protection" (Pet. App. 12a (emphasis in original)). This ruling misapprehends the statutorily prescribed nature of a challenge to adverse agency action and distorts the scheme erected by the CSRA.

Under the Act, the procedures providing for challenges to adverse agency action plainly were designed to protect the rights of the aggrieved *employee*. It is the employee who determines the forum for the challenge (5 U.S.C. 7121(e)(1)), and it is the employee—rather than the union—who may seek judi-

cial review from an adverse decision on his claim. 5 U.S.C. 7121(f), 7703. Similarly, the evidentiary standards that govern a challenge require the arbitrator and the Board to base their decision on the employee's situation (5 U.S.C. 7701(c)), and the employee carries the burden of "show[ing] harmful error." 5 U.S.C. 7701(c)(2)(A). Obviously, this statutory structure requires a focus on the rights of the employee.

It is true, of course, that the CSRA recognizes the significance of the union's interests. But Congress chose to safeguard those interests by providing unions with distinct remedial procedures. Thus the union may present grievances on its own behalf (5 U.S.C. 7121(b)(3)(A)), and in some circumstances may file unfair labor practice charges with the Federal Labor Relations Authority (FLRA). 5 U.S.C. 7116(d); see *Iowa National Guard & National Guard Bureau*, 8 F.L.R.A. 500, 510 (1982). Allowing the union's institutional interests also to be asserted in the context of an individual challenge to adverse agency action will lead to forum shopping and inconsistent results, and will make the harmful error rule a dead letter; because the union has other avenues for safeguarding its rights, the court of appeals' decision distorts the congressional scheme to no purpose.

Finally, the court of appeals erred in concluding that its holding was necessary to make the collective bargaining process meaningful. Bargained-for rights are not made meaningless simply because nonprejudicial violations of those rights cannot be asserted in individual grievance actions: to the contrary, violation of a contract's provisions will lead to reversal of adverse action whenever it might have had an effect on the agency's conclusions, and the

union may in any event itself challenge the error in its institutional capacity.

These factors validate the significant role for public employee unions that was created by Congress (see 5 U.S.C. 7101(a)(1)). At the same time, an interpretation of the harmful error rule that permits reversal of adverse agency action only on account of prejudicial procedural error "meet[s] the special requirements and needs of the [federal] Government" (5 U.S.C. 7101(b)) by balancing against the union's interests the need to "preserv[e] the ability of federal managers to maintain 'an effective and efficient Government." *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, No. 82-799 (Nov. 29, 1983), slip op. 2 (quoting 5 U.S.C. 7101(b)). The court of appeals erred by disturbing this balance, which was struck by Congress and confirmed by the Board.

ARGUMENT

AN ARBITRATOR MAY SET ASIDE ADVERSE AGENCY ACTION TAKEN AGAINST A FEDERAL EMPLOYEE BECAUSE OF PROCEDURAL ERROR ONLY WHEN THAT ERROR MIGHT HAVE AFFECTED THE AGENCY'S DECISION

Under the Civil Service Reform Act of 1978, federal workers who belong to bargaining units may challenge adverse agency action in one of two ways: they either may appeal to the Merit Systems Protection Board, or they may invoke the grievance procedures set out in their union's collective bargaining agreement. In either event, however, they may obtain relief on account of an agency's procedural mistakes only by "show[ing] harmful error in the application of the agency's procedures." 5 U.S.C. 7701(c)(2)(A).

The court of appeals' decision in this case—which vacated adverse agency action because of procedural violations that concededly "were not personally prejudicial to [the] grievants" (Pet. App. 10a)—largely eviscerates this statutorily prescribed "harmful error" rule in the context of arbitral review of adverse action. In doing so, the court of appeals disregarded Congress's express intent by creating two distinct standards for review of adverse agency action: one to be applied by arbitrators in appeals by bargaining unit employees and another to be applied by the MSPB. This dichotomy inevitably will lead to forum shopping by bargaining unit employees. And it will, in violation of legislative intent, result in the grievances of bargaining unit members being judged under a different and far more favorable standard than are those of other federal employees.

A. An Error Is Harmful Within The Meaning Of The Civil Service Reform Act Only If It Prejudices The Individual Employee

1. a. The CSRA places on a federal employee challenging adverse agency action the burden of demonstrating that a claimed procedural violation was "harmful." 5 U.S.C. 7701(c)(2)(A).[9] The MSPB accordingly has construed the harmful error standard as requiring a demonstration of prejudice to *the individual employee*. Pursuant to the authority granted it in 5 U.S.C. 7701(j), the Board has defined "harmful error" as:

---

[9] Indeed, the statute requires the employee to plead "harmfulness" as an affirmative defense. See 5 U.S.C. 7701(c)(2)(A); *Parker* v. *Defense Logistics Agency*, 1 M.S.P.B. 489, 492 (1980); see also 5 C.F.R. 1201.56(b)(1).

> Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

5 C.F.R. 1201.56(c)(3).[10]

The Board also has explained that, for purposes of Section 7701, "the provisions of [a collective bargaining] agreement shall be treated * * * in the same manner as are provisions of [an] agency's regulations." *Stalkfleet* v. *United States Postal Service*, 6 M.S.P.B. 536, 537 (1981).[11] As a result, an agency's failure to abide by bargained-for procedures may support a challenge to adverse action—but only when the grievant "show[s] that the agency's failure * * * constituted harmful error which would likely affect the result of the removal action." *Id.* at 539, citing *Fuiava* v. *Department of Justice*, 3 M.S.P.B. 217 (1980); *Parker* v. *Defense Logistics Agency*, 1 M.S.P.B. 489 (1980).

---

[10] See also *Parker* v. *Defense Logistics Agency*, 1 M.S.P.B. 489, 493 (1980) (citations omitted) ("Unless it is likely that an alleged error affected the result, its occurrence cannot have been prejudicial. Stated another way, the question is whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency."); *Fuiava* v. *Department of Justice*, 3 M.S.P.B. 217, 218 (1980); *Davies* v. *Department of the Navy*, 4 M.S.P.B. 83, 85 (1980).

[11] Accord, *Battaglia* v. *Department of Health & Human Services*, 5 M.S.P.B. 212, 213 (1981); *Geisler* v. *Department of Transportation*, 3 M.S.P.B. 367, 368 (1980), aff'd, 686 F.2d 844 (10th Cir. 1982).

These conclusions of the Board—which accord with the definition given the term "harmful error" in other contexts (see, *e.g.*, *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6)—are due considerable deference. See, *e.g.*, *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 6. Indeed, they are necessary to effectuate Congress's clearly expressed intention that procedural irregularity result in the reversal of agency action "only if the procedures followed substantially impaired the rights of the employees." S. Rep. 95-969, *supra*, at 64.[12]

b. There is no doubt that the same harmful error standard that governs decisions by the MSPB also must control arbitral review of adverse agency action. The CSRA expressly provides that arbitrators must apply the same substantive standards as does the Board. 5 U.S.C. 7121(e)(2).[13] The Act's legislative history confirms that "substantial disuniformity between the review powers of arbitrators and of the MSPB would frustrate congressional intent" (*Devine* v. *Pastore*, 732 F.2d 213, 216 (D.C. Cir. 1984)): Congress made it plain that "when considering a grievance involving an adverse action otherwise appealable to the MSPB * * * the arbitrator must follow the same rules governing burden of proof and standard of proof that govern adverse actions before the Board." H.R. Rep. 95-1717, *supra*, at 157. Similarly, Congress made arbitral decisions subject to judicial review "in the same manner and under the same conditions as if the matter had been decided by the [MSPB]" (5 U.S.C. 7121(f)) expressly "to assure conformity between the decisions of arbitrators [and] those of the Merit Systems Protection Board." S. Rep. 95-969, *supra*, at 111. See *Devine* v. *Goodstein*, 680 F.2d 243, 246 (D.C. Cir. 1982).[14]

2. While the court of appeals acknowledged the import of the statutory language and legislative history (see Pet. App. 10a-12a & n.12) and purported

[12] The original Senate version of the bill that became the CSRA explicitly provided (S. Rep. 95-969, *supra*, at 179, 224 (emphasis added)) that "[a]n agency action shall be upheld by the Board, the administrative law judge, or the appeals officer unless—(A) the agency's procedures contained error that substantially impaired the rights of *the employee*." See also *id.* at 54, 64. Although the language was modified in the legislation as enacted, no substantive change in meaning was noted in the Joint Explanatory Statement of the Committee on Conference, which explained "the effect of the major actions agreed upon by the managers of the two Houses of Congress" (H.R. Rep. 95-1717, *supra*, at 127).

[13] Section 7121(e)(2) provides that the decision of an arbitrator must be "governed" by 5 U.S.C. 7701(c)(1). That provision sets forth the standard of proof and burden of proof applicable in employee appeals to the MSPB. Section 7701(c)(1) also incorporates by reference the harmful error requirement of 5 U.S.C. 7701(c)(2). These provisions leave little room for doubt that Congress meant the harmful error standard to apply to arbitral decisions (see *Devine* v. *White*, 697 F.2d 421, 441 (D.C. Cir. 1983))—as the court below acknowledged. Pet. App. 11a-12a n.12. See *Devine* v. *Brisco*, 733 F.2d 867, 872 (Fed. Cir. 1984).

[14] Thus arbitral decisions must take account of the CSRA's harmful error rule. It is well established that an arbitral award that violates external law is unenforceable in federal court. See *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber Workers*, No. 81-1314 (May 31, 1983), slip op. 8-9. And because "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land" (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974)), an arbitrator's interpretation of the harmful error rule of 5 U.S.C. 7701(c)(2)—unlike the interpretation of the Board—is entitled to no special deference.

to "hold the arbitrator to the [harmful error] rule insofar as he decides the particular instance of the individual grievant" (*id.* at 11a (footnote omitted)),[15] the decision below in fact eviscerates the rule in the context of arbitral proceedings. Under the MSPB's interpretation of the harmful error requirement, a grievant may obtain relief only by demonstrating a procedural error that "prejudice[d] * * * his/her rights" by possibly affecting the agency's conclusion. 5 C.F.R. 1201.56(c)(3). To the extent that the decision below allows "the arbitrator [to] take account of significant violations of the collective bargaining agreement, important to the union, *even though the particular grievants may not have been themselves adversely affected*" (Pet. App. 12a (emphasis added)), it simply disregards the statutory language and the MSPB's binding definition of harmful error.

Indeed, it is difficult to conceive of what would remain of the harmful error requirement if agency action may be set aside on account of "collective bargaining violations important to the union but not prejudicial to the individual grievant" (Pet. App. 11a). And the court of appeals compounded its error by failing even to place a limit on the type of contractual provision that, if violated, would result in the setting aside of agency action in the absence of prejudice to the individual employee. To the contrary, the court of appeals' opinion suggests that the simple "presence in the contract" of given procedural de-

[15] Given the nature of its decision, this statement by the court of appeals is meaningless. In every challenge to adverse action the arbitrator must resolve the particular complaint of the individual grievant; here, the arbitrator resolved the grievants' complaints by barring their removal from government service (Pet. App. 39a).

vices "is evidence of their substantiality and importance to the union and its members" (*id.* at 14a).[16]

This approach inevitably will frustrate the central purpose of the Act's standard of proof provisions, of which the harmful error rule is a part: that of "streamlin[ing] the processes for dismissing and disciplining federal employees." S. Rep. 95-969, *supra*, at 2. See *id.* at 3-4, 9, 19, 51, 54.[17] Congress expressly directed that agency actions not be reversed on account of "technical procedural oversights" (*id.* at 54), with the aim of overcoming the "widely held impression * * * that a government employee cannot be fired, regardless of unacceptable conduct" (*id.* at

[16] The Federal Circuit attempted to give substance to its version of the harmful error standard in its subsequent decision in *Devine* v. *Brisco*, 733 F.2d 867 (1984). The court of appeals there stated that reversal of adverse agency action is appropriate where "a union can show violations tantamount to harmful error to itself" (*id.* at 872)—for example, when the agency's procedural errors "interfered with the union's preparation for hearings and resulted in the filing of additional unfair labor practice charges." *Id.* at 873. But since the errors addressed in this case and discussed in *Brisco* did not affect the outcome of an adverse action proceeding, the *Brisco* standard plainly has no relationship to the harmful error requirement spelled out in 5 U.S.C. 7701(c)(2) and defined in 5 C.F.R. 1201.56(c)(3). Indeed, because the test for reversal that is stated in *Brisco* (and that *Brisco* read into the decision in this case (see 733 F.2d at 872-873)) is not tied to whether the asserted error might have affected the outcome of the adverse action proceeding, it presumably requires the arbitrator in every case to make an ad hoc, standardless decision whether the effect of the error on the union was "harmful" in some abstract sense.

[17] See also *Stankis* v. *EPA*, 713 F.2d 1181, 1186 (5th Cir. 1983); *Weiss* v. *United States Postal Service*, 700 F.2d 754, 758 (1st Cir. 1983); *Schramm* v. *Department of Health & Human Services*, 682 F.2d 85, 88 (3d Cir. 1982).

9). This streamlining of the employment process, Congress believed, would serve the "public's need to have its business conducted competently" (*id.* at 3). Here, the arbitrator readily agreed that the grievants—law enforcement officers who falsified official records and misused government property—acted in an unacceptable manner and that their actions fully justified removal from federal service. It turns the Act on its head to conclude that its provisions force the government to retain such employees because the Agency committed a concededly non-prejudicial procedural mistake while attempting to serve the public interest by terminating their employment.

B. The Court Of Appeals' Approach Runs Counter To Congressional Intent By Encouraging Forum Shopping And Inconsistent Decisions In Adverse Action Proceedings

As noted above, Congress went to considerable lengths in the CSRA to assure that arbitrators and the MSPB would apply the same substantive standards in judging challenges to adverse agency action. It did so expressly "to promote consistency in the resolution of these issues, and to avoid forum shopping." H.R. Rep. 95-1717, *supra*, at 157. The court of appeals' decision effectively frustrates both of these legislative purposes.

Most obviously, the decision below virtually guarantees that forum shopping will occur. Arbitrators and MSPB both may consider challenges to adverse action based upon asserted procedural errors. See *Stalkfleet*, 6 M.S.P.B. at 537; *Giesler*, 3 M.S.P.B. at 368. It is within "the discretion of the aggrieved employee" to determine where the challenge will be brought. 5 U.S.C. 7121(e)(1). Yet if an arbitrator,

unlike the Board, is free to grant relief to employees who have not been personally prejudiced by asserted agency errors, every rational bargaining unit employee with a claim that the agency violated procedures guaranteed by a collective bargaining agreement will "exercise[] his option" (*ibid.*) to choose review through the negotiated grievance procedure. See *Pastore*, 732 F.2d at 216. This effect can be seen on the facts here: had one of the grievants elected to appeal to the MSPB, his discharge would have been upheld—even though the other grievant, who engaged in virtually identical misconduct, had been reinstated.

This situation will lead to predictable and systematic inconsistencies in the outcomes of adverse action appeals. Indeed, entirely different standards of review will be applied to the two portions of the federal workforce. The 39% of federal employees who are not represented by unions[18] will be able to challenge adverse agency action on account of a procedural violation only if they can demonstrate that, in the absence of the alleged violation, the agency might have reached a different result.[19] By contrast, the 61% of federal employees who are bargaining unit members will not be required to make such a showing

---

[18] These figures are based on Office of Policy and Communications, OPM, *Union Recognition in the Federal Government* 30 (1983); OPM, *Federal Personnel Manual Bulletin No. 711-89*, Attach. 2, at 10 (Dec. 1, 1983).

[19] The Federal Circuit has expressly approved the MSPB's construction of the harmful error rule as applied in proceedings before the Board. See *Cheney* v. *Department of Justice*, 720 F.2d 1280, 1285 (1983); *Shaw* v. *United States Postal Service*, 697 F.2d 1078, 1080-1081 (1983); *Miguel* v. *Department of the Army*, 727 F.2d 1081, 1084-1085 (1984); see also *Brewer* v. *United States Postal Service*, 647 F.2d 1093, 1097 (Ct. Cl. 1981), cert. denied, 454 U.S. 1144 (1982).

to have adverse action set aside. These circumstances represent the sort of unfair, disparate treatment of otherwise similarly situated federal employees that Congress wished to forestall in the CSRA.

C. A Union May Not Assert Violations Of Its Procedural Rights In The Context Of An Individual Employee's Challenge To Adverse Agency Action

The court of appeals itself recognized the significance of the harmful error standard (see Pet. App. 10a-11a) and acknowledged that failure to apply the standard strictly in arbitral proceedings might lead to forum shopping.[20] The court nevertheless justified its holding in this case by reasoning that "[t]he union is a major (if not *the* major) party to the arbitration and its proper interests are to be protected, even though the interests of particular grievants may not, alone, call for protection" (Pet. App. 12a (emphasis in original)). But this approach misapprehends the statutorily prescribed nature of a challenge to adverse agency action and distorts the scheme erected by the CSRA.

1. a. In a challenge to adverse agency action, the Act places the focus squarely on the protection of the aggrieved employee. "[T]he thrust of [such an] action," after all, "is the promotion of the rights and interests of the employee." *AFGE, Local 1286* v. *United States Department of Justice*, 738 F.2d 742, 746 (6th Cir. 1984) (footnote omitted). Thus "it is

[20] Thus, the court of appeals noted that "[e]mployees who wish to appeal an agency's decision to discipline or remove them from service may choose arbitration, rather than an appearance before the Merit Systems Protection Board, depending upon the applicability of the 'harmful error' standard in arbitration proceedings" (Pet. App. 8a). But the court made no attempt to reconcile this observation with its holding.

the *employee* who from the inception of the proceedings determines the procedural avenues to travel" by deciding whether to use the negotiated grievance procedure at all (*id.* at 745 (emphasis in original), 5 U.S.C. 7121(e)(1)),[21] and it is the employee—rather than the union—who may seek judicial review if an adverse decision on his claim is issued by an arbitrator (*Local 1286*, 738 F.2d at 745; see 5 U.S.C. 7121(f), 7703(a)(1)). Similarly, the statutorily-prescribed evidentiary standards that govern challenges to adverse agency action require the arbitrator to base his decision on the employee's situation (5 U.S.C. 7701(c)), and reversal is proper on account of an agency's procedural error only when the "*employee* or *applicant* for employment" carries the burden of "show[ing] harmful error in the application of the agency's procedures in arriving at [its] decision" (5 U.S.C. 7701(c)(2) and (A) (emphasis added)). Indeed, if the union disagrees with an employee's decision not to use the negotiated grievance procedure or to dispense with judicial review, it "is without recourse." *Local 1286*, 738 F.2d at 745. This statutory structure hardly suggests that the arbitrator may focus on the rights of the union, rather than the rights of the employee.

[21] While the union as "exclusive representative" may, pursuant to 5 U.S.C. 7121(b)(3)(C), elect arbitration on behalf of an employee who is challenging adverse action pursuant to 5 U.S.C. 7121(e)(1), under the latter provision it is the employee who in the first instance must "exercise[] his option" to use the negotiated grievance procedure. See *Local 1286*, 738 F.2d at 745. Indeed, so far as a challenge to adverse action is concerned, the employee may, under Section 7121(e)(1), use the grievance procedure to address only those issues that may "be raised • • • under the appellate procedures of section 7701." These issues plainly do not include harm to the union's institutional interests.

This congressional emphasis on the situation of the individual employee points up the flaw in the court of appeals' unprecedented suggestion that the arbitrator properly ordered reinstatement of the grievants to "penaliz[e] the agency" (Pet. App. 14a). "Punishing" the Agency by forcing it to retain employees who concededly deserve to be dismissed necessarily will frustrate Congress's attempts to serve "the public's need to have its business conducted competently." S. Rep. 95-969, *supra*, at 3.[22] And it will have a more anomalous effect as well. If the Board finds that an agency error was harmful to an aggrieved employee, it will vitiate the agency action; the agency generally remains free, however, to initiate new proceedings against an employee who has acted improperly. See *Ryder* v. *United States*, 585 F.2d 482, 489 (Ct. Cl. 1978). But if the agency has been forced to reinstate the employee as "punishment" for procedural error, the agency presumably will not be free to renew its attempts to remove the employee from the federal workforce. As a result, an employee might profit by having the arbitrator find that the agency committed procedural error harmful to the *union*, rather than procedural error harmful to the employee *himself*. Such a state of affairs plainly would be inconsistent with the statutory focus on the evidentiary showing made by the employee.

---

[22] This case is a particularly inappropriate one in which to "penalize" the Agency. Neither the arbitrator nor the court of appeals made any suggestion that the Agency intentionally denied the grievants their rights. To the contrary, as the Federal Labor Relations Authority concluded, "the dispute in this case involves differing and arguable interpretations of the contracts' intent and meanings" (Pet. Reply Br. Mem. App. 6a). See note 25, *infra*; note 4, *supra*.

b. At the same time, of course, it is true that the CSRA "recognizes a duality of interest among employees and the Union." *Local 1286*, 738 F.2d at 745. But the fact that union interests may be implicated when collective bargaining agreement provisions are violated does not justify a departure from the clear congressional intent that agency disciplinary action involving an *individual employee* be set aside only on account of procedural error that caused harm to the *employee*.[23] Instead, the Act effectuates this duality of interest by assigning distinct remedial procedures to employees and to unions.[24]

For example, 5 U.S.C. 7121(b)(3)(A) requires that a union be permitted "in its own behalf * * * to present and process grievances," and 5 U.S.C. 7103(a)(9)(C)(i) defines "grievance" to include "any complaint * * * by any * * * labor organization concerning * * * the effect or interpretation, or a claim of breach, of a collective bargaining agreement." Although, as a practical matter, most griev-

---

[23] Indeed, even in the private sector—where there is, of course, no statutory "harmful error" rule—arbitrators frequently refuse to set aside management action on account of technical violations of procedures contained in the collective bargaining agreement "where the employee had not been adversely affected by the failure of management to accomplish total compliance with the requirements." F. Elkouri & E. Elkouri, *How Arbitration Works* 634 (3d ed. 1973) (footnote omitted).

[24] An employee's pursuit of his remedies would not bar the union from itself challenging an agency's violation of bargained-for procedures. See *Department of Air Force*, 14 F.L.R.A. 390, 391-392 (1984); *Internal Revenue Service*, 9 F.L.R.A. 480, 480-481 n.2, 492-493 (1982); *United States Air Force*, 4 F.L.R.A. 512, 527 (1980). See also *Carter* v. *Kurzejeski*, 706 F.2d 835, 843 n.10 (8th Cir. 1983).

ances filed by a union on its own behalf will likely be intended to remedy violations of the agreement that affect the interests of the union as an institution, the statutory authorization clearly encompasses grievances alleging violation of any type of contractual provision, including the notice and representation requirements involved in this case. As a remedy for the violation of such provisions, the union could request that the arbitrator order the employing agency to "cease and desist" from any further such violations. Cf. *Carter* v. *Kurzejeski*, 706 F.2d 835, 843 (8th Cir. 1983).

In addition, although the filing of a grievance in the context of the negotiated grievance procedures is the usual means of resolving questions of contract interpretation and breach, where the agency's "interpretation of the negotiated agreement was such that it resulted in a clear and patent breach of the terms of the agreement," the union also possesses the option of filing an unfair labor practice charge with the Federal Labor Relations Authority. *Iowa National Guard & National Guard Bureau*, 8 F.L.R.A. 500, 510 (1982); see also *Food Safety & Quality Service*, 7 F.L.R.A. 665, 672-673 (1982). Indeed, that is precisely the course that the Union followed in this case.[25]

---

[25] The FLRA declined to issue an unfair labor practice charge based on the Agency's failure to advise the grievants of their right to union representation during interrogation because it concluded that "the dispute in this case involves differing and arguable interpretations of the contracts' intent and meanings, and should therefore appropriately be resolved through the parties' negotiated grievance/arbitration procedures, rather than in the unfair labor practice forum" (Pet. Reply Mem. App. 6a). But the Authority did assume jurisdiction and issued a complaint (see Pet. Reply Mem. App. 7a) in response to another of the challenged Agency actions (involving the Agency's instructions to employees who had been interviewed in connection with the investigation of grievants that they should not discuss the interviews with other persons (see Pet. App. 27a, 30a)); the complaint ultimately was settled pursuant to the Authority's approval.

Finally, the CSRA establishes different mechanisms for judicial review of arbitral decisions involving the rights of employees and the rights of unions. An employee may appeal an arbitrator's decision in an adverse action proceeding directly to the Federal Circuit. 5 U.S.C. 7121(f), 7703(a)(1); 28 U.S.C. 1295(a)(9). The right of appeal to the Federal Circuit may not be exercised by the union on the employee's behalf, however. And if a union wishes to challenge an arbitrator's decision affecting *its* institutional rights, it must seek review first from the FLRA (5 U.S.C. 7122(a)) and then in the regional courts of appeals (5 U.S.C. 7123(a)). Furthermore, the union may obtain judicial review in an action that it filed on its own behalf only when the challenged arbitral decision involved an unfair labor practice. 5 U.S.C. 7123(a)(1); see *American Federation of Government Employees, Local 1923* v. *Federal Labor Relations Authority*, 675 F.2d 612 (4th Cir. 1982). This scheme plainly suggests that Congress intended unions to follow their own procedural course in challenging "significant violations of the collective bargaining agreement" (Pet. App. 12a), rather than "bootstrapping" their way into employee challenges to adverse agency action.

2. Using employee adverse action challenges to vindicate a union's procedural rights also runs counter to the congressional purposes that underpin the CSRA. As noted above, Congress required a

demonstration of harmful error by the aggrieved employee "to avoid unnecessary reversal of agency action because of technical procedural oversights." S. Rep. 95-969, *supra*, at 54. Indeed, the Federal Circuit itself has acknowledged that the harmful error standard plays such a significant role in the congressional scheme that an agency and a union may not "exclude the harmful error rule from [a collective bargaining] agreement." *Devine* v. *Brisco*, 733 F.2d 867, 872 (Fed. Cir. 1984). But by allowing arbitrators to overturn adverse action whenever the union demonstrates some undefined harm to its institutional interests, the decision below threatens to make the harmful error rule a dead letter and convert the arbitral process into a "'citadel[] of technicality.'" *McDonough Power Equipment, Inc.* v. *Greenwood*, No. 82-958 (Jan. 18, 1984), slip op. 5, quoting *Kotteakos* v. *United States*, 328 U.S. 750, 759 (1946). At the same time, the court of appeals' scheme will, of course, promote both forum shopping and inconsistent judgments.

The provisions noted above (see page 25, *supra*) demonstrate that Congress already has afforded unions adequate means to protect their own rights. In these circumstances, the court of appeals plainly erred in frustrating Congress's express intent that the harmful error rule be applied rigorously, and that bargaining unit and non-bargaining unit employees be treated similarly, simply to provide another avenue for assuring the vindication of union rights. Cf. *Brown* v. *GSA*, 425 U.S. 820 (1976).

3. Finally, the court of appeals apparently concluded that its decision was necessary to make the collective bargaining process meaningful (see Pet. App. 12a). But this conclusion plainly was incorrect; bargained-for rights are hardly made meaningless because non-prejudicial violations of those rights cannot be enforced in individual adverse action proceedings. Thus unions are free to bargain for procedures to govern agency action (5 U.S.C. 7106(b)(2) and (3)), and agencies are obligated to abide by the agreed-upon procedures. If prejudicial violations of the procedures occur, any resulting adverse action will be reversed by the Board or by an arbitrator. And the union as an institution may challenge agency errors by filing either a grievance of its own or an unfair labor practice charge. It is these remedies that give force to Congress's intention to "make the collective-bargaining process a more effective instrument of the public interest." *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, No. 82-779 (Nov. 29, 1983), slip op. 18. See 5 U.S.C. 7701(a)(1).

At the same time, however, Congress designed the CSRA "to meet the special requirements and needs of the Government" (5 U.S.C. 7101(b)) by, among other things, "giv[ing] agencies greater ability to remove or discipline expeditiously employees who engage in misconduct, or whose work performance is unacceptable." S. Rep. 95-969, *supra*, at 51. See pages 19-20, *supra*. The harmful error rule, if interpreted to permit reversal of adverse agency action only on account of procedural errors that prejudiced the employee, helps to reconcile these interests by "[a]llow[ing] civil servants to be * * * hired and fired more easily, but for the right reasons." S. Rep. 95-969, *supra*, at 3. This balance—which was struck by Congress and confirmed by the Board—gives due consideration to the significant role played by public employee unions, "while carefully preserving the

ability of federal managers to maintain 'an effective and efficient Government.'" *Bureau of Alcohol, Tobacco & Firearms*, slip op. 2, quoting 5 U.S.C. 7101 (b).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

DAVID M. COHEN
GEORGE M. BEASLEY, III
Attorneys

NOVEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461831 10092

AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
FILED
DEC 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1673

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

ALLISON E. NUTT, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR THE NATIONAL TREASURY EMPOYEES UNION AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

H. STEPHEN GORDON
General Counsel

PATRICK J. RILEY
Deputy General Counsel

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES
1016 16th Street, N.W.
Washington, D.C. 20036
(202) 862-4400

LOIS G. WILLIAMS *
Director of Litigation

RICHARD S. EDELMAN
Assistant Counsel

NATIONAL TREASURY
EMPLOYEES UNION
1730 K Street, N.W.
Suite 1101
Washington, D.C. 20006
(202) 785-4411

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the lower court correctly interpreted the Civil Service Reform Act's "harmful error" rule, 5 U.S.C. 7701(c)(2)(A), as allowing an arbitrator to remedy agency employer violations of important contractual due process safeguards by mitigating penalties to grievant employees, absent prejudice to the individual grievants.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICI	1
STATEMENT OF THE CASE	2
STATUTORY BACKGROUND	6
SUMMARY OF ARGUMENT	8
ARGUMENT	
I. THE COURT BELOW PROPERLY HELD THAT AN ARBITRATOR MAY MITIGATE A PENALTY WHEN AN AGENCY HAS VIOLATED SIGNIFICANT CONTRACTUAL SAFEGUARDS, REGARDLESS OF WHETHER THE VIOLATION WAS PERSONALLY PREJUDICIAL TO THE PARTICULAR EMPLOYEE	10
A. The Violation Of Important Contract Rights Was Properly Held To Be Harmful Error Within The Meaning Of The CSRA	10
B. Even If The MSPB Rule Dictated A Different Result, The CSRA Does Not Require That Arbitrators And The MSPB Apply Identical Interpretations Of The Harmful Error Rule	17
II. THE *NUTT* DECISION DOES NOT CREATE IMPERMISSIBLE DIFFERENCES BETWEEN RIGHTS OF ORGANIZED AND UNORGANIZED EMPLOYEES	20
III. VIOLATIONS OF THE RIGHTS OF EMPLOYEES IN GENERAL ARE PROPERLY CORRECTED THROUGH THE GRIEVANCE-ARBITRATION MECHANISM	22
CONCLUSION	28

TABLE OF AUTHORITIES

Cases: Page

Bureau of Alcohol Tobacco and Firearms v. Federal Labor Relations Authority, —— U.S. ——, 104 S.Ct. 439 (1983) 6, 21
Chapman v. *California*, 386 U.S. 18 (1967) 17
City of Sterling Heights and Teamsters, Local 214, 80 LA 928 (1982) 25
Department of Agriculture, Food Safety and Quality Service and AFGE Local 2490, 7 F.L.R.A. 665 (1982) 27
Department of Defense, Army-Air Force Exchange Service v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981) 10
Devine v. *Brisco*, 733 F.2d 867 (Fed. Cir. 1984) 19
Devine v. *Pastore, et al.*, 732 F.2d 213 (D.C. Cir. 1984) 19
Devine v. *Sutermeister, et al.*, 724 F.2d 1558 (Fed. Cir. 1984) 19
Devine v. *White*, 697 F.2d 421 (D.C. Cir. 1983) ..... *passim*
Ford Motor Co. v. *Huffman*, 345 U.S. 330 (1953) 23
Fort Wayne Community Schools and AFSCME, Local 561, 78 LA 928 (1982) 25
General Telephone Co. of California and Communications Workers of America, 78 LA 793 (1982) 25
Giesler v. *Dept. of Transportation*, 3 M.S.P.B. 367 (1980), *aff'd*, 686 F.2d 844 (10th Cir. 1982) 22
Internal Revenue Service, Detroit District and NTEU Chapter 24, 12 F.L.R.A. 445 (1982) 27
Kerr v. *National Endowment for the Arts*, 5 M.S.P.B. 299 (1981) 26
Lentenyei v. *Dept. of Transportation, FAA*, —— M.S.P.B. ——, *aff'd*, 735 F.2d 528 (Fed. Cir. 1984) 22
Library of Congress v. *FLRA*, 699 F.2d 1280 (D.C. Cir. 1983) 10
Local 2578, American Federation of Government Employees v. *General Services Administration*, 711 F.2d 261 (D.C. Cir. 1983) 18, 19

TABLE OF AUTHORITIES—Continued

Page

Morrow v. *Dept. of the Army*, 4 M.S.P.B. 494 (1980) 26
National Treasury Employees Union v. *FLRA*, 712 F.2d 699 (D.C. Cir. 1983) 11, 18
Newport News Shipbuilding & Dry Dock Co. and Steelworkers, Local 8888, 78 LA 921 (1982) 25
Parker v. *Defense Logistics Agency*, 1 M.S.P.B. 489 (1980) 13
Ratley v. *Dept. of the Army*, 11 M.S.P.B. 564 (1982) 26
Ryder v. *United States*, 585 F.2d 482 (Ct. Cl. 1978) 26
Social Security Administration and AFGE, Local 1923, 15 F.L.R.A. 614 (1984) 27
Stalkfleet v. *U.S. Postal Service*, 6 M.S.P.B. 536 (1981) 13, 22
United Rigging & Hauling, Inc. and Teamsters, Local 639, 79 LA 640 (1982) 25
United States v. *Hasting*, —— U.S. ——, 103 S.Ct. 1974 (1983) 17
United Steelworkers of America v. *Enterprise Wheel and Car Corp.*, 363 U.S. 591 (1960) 6, 11
United Steelworkers of America v. *Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960) 9, 11
Veterans Administration Medical Center, Tampa, Florida v. *FLRA*, 675 F.2d 260 (11th Cir. 1982) 11, 21
W.R. Grace and Company v. *Local 759, International Union of the United Rubber, Linoleum and Plastic Workers of America*, —— U.S. ——, 103 S.Ct. 2177 (1983) 11, 12
White v. *Dept. of the Treasury*, 4 M.S.P.B. 11 (1980) 26

Statutes and Regulations:

5 U.S.C. 1205 7
5 U.S.C. 4303 7
5 U.S.C. 7103(a) 6
5 U.S.C. 7106(b)(2) 6, 20

TABLE OF AUTHORITIES—Continued

	Page
5 U.S.C. 7114(a) (1)	23
5 U.S.C. 7116	6, 27
5 U.S.C. 7116(d)	22
5 U.S.C. 7117(a)	6
5 U.S.C. 7121(a)	7
5 U.S.C. 7121(b) (3) (A)	7
5 U.S.C. 7121(b) (3) (B)	7
5 U.S.C. 7121(b) (3) (C)	7, 20
5 U.S.C. 7121(e)	4, 22
5 U.S.C. 7121(e) (1)	8
5 U.S.C. 7121(e) (2)	8, 9, 15, 17
5 U.S.C. 7121(f)	5
5 U.S.C. 7513	4, 7
5 U.S.C. 7701(a)	4
5 U.S.C. 7701(c) (1) (B)	7
5 U.S.C. 7701(c) (2)	7, 15, 17
5 U.S.C. 7701(c) (2) (A)	5, 13, 15
5 U.S.C. 7701(c) (2) (B)	13
5 U.S.C. 7701(c) (2) (C)	13
5 U.S.C. 7703(d)	5, 8
31 U.S.C. 1349(b)	5
5 C.F.R. 1201.56	15
5 C.F.R. 1201.56(c) (3)	13
Miscellaneous:	
H.R. Rep. 95-1717, 95th Cong., 2d Sess. (1978)	16, 18
S. Rep. 95-969, 95th Cong., 2d Sess. (1978)	15, 16
F. Elkouri & E. Elkouri, *How Arbitration Works* (3rd ed. 1979)	25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1673

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

ALLISON E. NUTT, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR AMICI CURIAE NATIONAL TREASURY EMPLOYEES UNION AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI

Amici are two of the three largest labor unions which represent federal employees by, *inter alia*, negotiating collective bargaining agreements with federal agencies and representing such employees in arbitrations and appeals to the Merit Systems Protection Board. *Amici* and their members have a vital interest in this case which presents issues concerning arbitrators' interpretation and application of federal sector collective bargaining agreements and federal civil service laws.

Petitioner urges this Court to hold that arbitrators hearing federal employee adverse action appeals are bound not only by provisions of the Civil Service Reform Act but also by interpretations of that statute by the

Merit Systems Protection Board. The position urged by the government is not supported by the Civil Service Reform Act and is inconsistent with well-established federal labor relations policy of judicial deference to arbitration awards which draw their essence from the controlling collective bargaining agreements and are not violative of external law.

Because the Court must determine the relationship between federal sector collective bargaining agreements as interpreted by arbitrators and civil service law, *amici* are submitting this brief to assist the Court in its consideration of the questions raised by this litigation.

STATEMENT OF THE CASE

1. Thomas Rogers and Robert Wilson, Jr. (the grievants) were employed by the General Services Administration ("GSA" or the "Agency") as Federal Protective Service Officers at the Denver Federal Center, Denver, Colorado (Pet. App. 2a, 23a). Both grievants were members of a collective bargaining unit whose exclusive representative was respondent American Federation of Government Employees, Local 3275 ("AFGE" or the "Union"). AFGE and GSA are parties to a collective bargaining agreement ("Agreement") which establishes various procedural rights for employees who become the subjects of adverse actions (removals and suspensions for more than 14 days, 5 U.S.C. 4303, 7513). Among the procedural rights provided are: the right to notice of the opportunity to have a representative present during an interrogation [1] and the right to notice of a proposed

[1] Article XXVII, Section 2, of the collective bargaining agreement between GSA and the Union provides:

> The Employer agrees that during formal discussion where interrogation or written or sworn statements are taken from an employee, in connection with a charge that may result in disciplinary action against him, he will have the opportunity to have a representative present. It should be understood that counseling sessions are not formal discussions (Pet. App. 3a, n.2).

adverse action within a reasonable period of time after the event giving rise to the action.[2]

GSA sought to remove Wilson from his position with the Agency for falsification of official government tape recordings monitoring conversations between the Agency command post and patrol officers and for concealing activities which should have been a matter of record. The Agency sought to remove Rogers from his position for falsification of government records, failure to report suspected irregularities and use of a government vehicle for other than official purposes (Pet. App. 4a, 28a-29a).

During its investigation of these charges, GSA agents conducted initial "non-custodial" interrogations of Wilson and Rogers. The agents subsequently met a second time with the individual grievants to have them sign affidavits prepared from notes taken during the first interrogations. Contrary to Article XXVII, Section 2 of the Agreement, at no time was either grievant informed of his right to have a union representative present during the interrogations (Pet. App. 3a-4a, 26a-28a).

Wilson and Rogers first received notice of the Agency's proposal to remove them on April 2, 1982, nearly two months after the incidents which the Agency cited as the basis for the removal actions (Pet. App. 5a, 28a-29a); the Agreement specifies 40 days as the period within which such notice is "normally" to be given (Article XXVII, Section 3 of the Agreement).

2. Pursuant to the Civil Service Reform Act of 1978 ("CSRA" or "Act"), Pub. L. No. 95-454, 92 Stat. 1111

[2] Article XXVII, Section 3, of the collective bargaining agreement provides, in pertinent part:

> PROPOSED NOTICE: In the event an employee is issued a notice of proposed disciplinary or adverse action, that employee must be afforded and made aware of all his/her rights. These proposed notices shall be served on the employee(s) within a reasonable period of time (normally 40 calendar days) after the occurrence of the alleged offense or when the alleged offense becomes known to management (Pet. App. 5a, n.4).

(5 U.S.C. 7121(e)(1)), and the Agreement, Wilson and Rogers challenged their removal actions through the contractual arbitration procedures (Pet. App. 4a).[3]

The arbitrator (respondent Nutt) found that the grievants had committed the alleged acts of wrongdoing (Pet. App. 4a, 32a), but reduced the removal actions to two-week suspensions without pay because of the Agency's "pervasive" violations of the procedures it negotiated in the Agreement (*id.* at 38a). He also noted that the procedural rights contained in the Agreement afford "greater protection of the employee" than does the CSRA (*id.* at 33a).

Specifically, the Agency violated the agreement by failing to advise the grievants of their right to representation at four separate interrogations, and by issuing the notices of proposed removal beyond the contractual time limitations, causing "inordinate" delay (Pet. App. 5a, 34a, 36a-37a). While recognizing that the grievants' actions would "under normal circumstances justify their removal from government service" (*id.* at 32a), the arbitrator found that the "Agency's pervasive failure to comply with the due process requirements" of the collective bargaining agreement justified reduction of the penalties imposed (*id.* at 38a). He recognized that the procedural violations "may not have been prejudicial" to the grievants so as to render the actions void (*id.* at 35a-36a), but he deemed important the due process rights guaranteed by the Agreement. The Agency, in violating those rights, deserved to be penalized (*id.* at 35a-36a). Arbitrator Nutt stated that this approach, to penalize the wrongdoer, but not to void the disciplinary action altogether, "has been taken by most arbitrators and will most likely assure the Agency's making certain that the contract is followed in the future." (*id.* at 36a).

---

[3] Wilson and Rogers had the choice of appealing the actions through arbitration or through appeals to the Merit Systems Protection Board. 5 U.S.C. 7121(e), 7513(d), 7701(a).

3. Pursuant to 5 U.S.C. 7703(d) and 7121(f), petitioner, the Director of the Office of Personnel Management, sought review of the arbitrator's decision by the United States Court of Appeals for the Federal Circuit, claiming that Arbitrator Nutt had not properly applied the Act's "harmful error" rule (5 U.S.C. 7701(c)(2)(A)) concerning violations of the procedural rights of employees. (Pet. App. 8a). The court affirmed the decision and award of the arbitrator in all but one respect not at issue here.[4]

The court clearly held that, in adverse action cases, in which the employee has the option to proceed either to the Merit Systems Protection Board (MSPB) or to arbitration, arbitrators must apply the same burdens of proof and standards that are applied by the MSPB under 5 U.S.C. 7701(c). In particular, arbitrators must apply the statutory "harmful error" standard, under which an agency's adverse action decision may not be sustained if the employee "shows harmful error in the application of the agency's procedures in arriving at such decision." (Pet. App. 10a-11a). However, the court held that the arbitrator had properly applied the harmful error rule, recognizing that "violations of explicit and important procedural rights contained in a contract, such as these, could fairly be said to be tantamount to 'harmful error' to the union within the scope of 5 U.S.C. 7701(c)(2)(A)(1982) for the purposes of collective bargaining arbitration in which the union is a proper party." (Pet. App. 14a).

The court recognized that even where a grievant is not "personally" prejudiced by the Agency's violations of contractual procedures (Pet. App. 10a), important procedural safeguards are significant protections for the

---

[4] The court held that the arbitrator lacked authority to reduce Rogers' penalty to less than a one-month suspension, the statutory minimum penalty for misuse of a government vehicle (31 U.S.C. 1349(b)) (Pet. App. 14a-16a).

Union and its members, of which an arbitrator may take account (*id.* at 13a-14a). The court held that because the union is "a major (if not *the* major) party to the arbitration," its proper interests are to be protected (*id.* at 12a-13a). Accordingly, the Agency's "pervasive failure" to comply with contractual due process requirements justified the arbitrator's mitigation of the penalties. The award "dr[e]w its essence from the collective bargaining agreement," and "did not controvert any civil service law or regulation" (*id.* at 13a-14a). The court therefore held that the arbitrator's enforcement of these substantial procedural protections "by, in effect, penalizing the agency for disregarding them was reasonable and within the scope of his authority," and should be affirmed, relying upon *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960) (*id.* at 14a).

STATUTORY BACKGROUND

The Civil Service Reform Act is "a comprehensive revision of the laws governing the rights and obligations of civil servants, [and] contains the first statutory scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol Tobacco and Firearms* v. *Federal Labor Relations Authority*, —— U.S. ——, 104 S. Ct. 439, 441 (1983).

Title VII of the statute, 5 U.S.C. 7701 *et seq.*, requires federal agencies and unions representing agency employees to "negotiate over terms and conditions of employment, unless a bargaining proposal is inconsistent with existing federal law, rule or regulation. *Id.*; 5 U.S.C. 7103(a), 7116, 7117(a). Even matters specifically reserved to agency management discretion (*e.g.*, the right to suspend or remove employees, 5 U.S.C. 7106(a)(2)(A)), are subject to negotiations concerning procedures which management officials will observe in exercising their authority. 5 U.S.C. 7106(b)(2). The CSRA requires that all collective bargaining agreements between federal agencies and unions provide for a grievance procedure and binding arbitration for the resolution of disputes arising under such agreements. 5 U.S.C. 7121(a) & (b). Under the statute, the union has the right to be present during all grievance proceedings (5 U.S.C. 7121(b)(3)(B)); only the union or the agency may invoke binding arbitration (5 U.S.C. 7121(b)(3)(C)).

The CSRA also contains a comprehensive scheme governing agency personnel actions against federal employees. The Act sets forth procedural requirements for an agency undertaking adverse actions (discharges and suspensions for more than 14 days), and establishes the Merit Systems Protection Board to hear and decide employee appeals from adverse actions. 5 U.S.C. 1205, 4303(b)-(d), 7513, 7701(a). The Act also specifies burdens of proof and standards of review applicable to employee appeals. 5 U.S.C. 4303(a), 7513(a), 7701(c).

In a case of alleged employee misconduct, adverse action may not be sustained unless the agency proves, "by a preponderance of the evidence" that the action "promotes the efficiency of the service". 5 U.S.C. 7513(a), 7701(c)(1)(B). In cases of alleged poor work performance, adverse action may not be sustained unless the agency proves by "substantial evidence" that the employee's performance was "unacceptable" within the meaning of the Act. 5 U.S.C. 4303, 7701(c)(1). However, in all cases, agency action may not be sustained if the employee "shows harmful error in the application of the agency's procedures in arriving at such decision". 5 U.S.C. 7701(c)(2)(A).[5] It is this provision which the government asserts has been violated in the instant case.

Under the CSRA, an employee covered by a collective bargaining agreement may elect to challenge an adverse action either through the contract grievance arbitration

[5] Section 7701(c)(2) provides two other bases for reversal of adverse actions. *See* discussion at n.7 *infra*. Those provisions are not at issue in this case.

procedure or to the MSPB. 5 U.S.C. 7121(e)(1). In such adverse action cases (as in the grievances of Thomas Rogers and Robert Wilson, Jr.), the arbitrator is governed by Section 7701(c) which specifies burdens of proof in adverse actions. 5 U.S.C. 7121(e)(2).

The statute provides for judicial review of both MSPB decisions and arbitration awards in adverse action cases "in the same manner and under the same conditions." 5 U.S.C. 7121(f), 7703. Under the Federal Courts Improvement Act of 1982, such appeals lie exclusively in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(d).

In sum, the CSRA provides for federal sector collective bargaining agreements with arbitration as the means of resolving disputes under those agreements; establishes standards and procedures governing adverse actions; provides for appeals to the MSPB from such adverse actions; recognizes arbitration as an equivalent alternative adverse action appeal route for employees covered by collective bargaining agreements; and provides for judicial review of both MSPB decisions and arbitral adverse action awards in one court of appeals.

SUMMARY OF ARGUMENT

A. The court below properly held that the agency's violations of collectively bargained procedural safeguards was harmful error under the CSRA and cause for mitigation of the penalties to the grievants. The CSRA provides for collective bargaining and arbitration of labor disputes in the federal sector, including disputes concerning adverse actions against federal employees covered by collective bargaining agreements.

Arbitrator Nutt's interpretation and application of the harmful error rule, in response to the agency's pervasive violation of contract procedural rights, is appropriate under the CSRA. Neither the language of the statutory harmful error provision, nor the applicable legislative history, preclude consideration of important contract

rights. Nor does the statute require a showing, as the MSPB does, that an adverse action may be reversed for harmful error only where a different result might have been reached, but for the violation. The MSPB however, is not called upon to consider the rights of employees at large. The union as bargaining representative of all of the employees in the bargaining unit, has a significant interest in enforcing the procedural rights it bargained for the entire unit. The arbitrator, unlike the MSPB, was bound to give full effect to the provisions of the agreement and to remedy violations of important contract rights. *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960). Thus, the arbitrator's decision is not in conflict with the CSRA.

B. Even if the MSPB would have reached a different result, under its interpretation of the harmful error rule, the lower court properly affirmed the arbitrator's award. The arbitrator's award is not in conflict with the MSPB's interpretation of the rule. The MSPB is responsible only for adjudicating the rights of individual employees under the statute; it is not bound by the terms of a collective bargaining agreement and it is not concerned with the interests of all of the employees covered by the agreement. Its interpretation therefore has no application to arbitration where the union is the major party and where the rights of *all* employees are implicated.

To the extent that there is a difference between the arbitrator's interpretation of the harmful error provision and the MSPB's interpretation, it is not an impermissible difference. While Congress required that arbitrators apply the same burdens of proof and standards of review as the MSPB, 5 U.S.C. 7121(e)(2), it did not require that arbitrators apply the same *interpretations* of those standards and burdens as the MSPB. *Devine* v. *White*, 697 F.2d 421 (D.C. Cir. 1983).

C. Congress sought to promote collective bargaining between federal agencies and unions representing their employees. Thus, contrary to petitioner's assertions, Con-

gress fully expected that there would be different rights for organized and unorganized employees.

D. Unions as collective bargaining representatives of bargaining unit employees, and representatives of unit employees who appeal adverse actions to arbitration, properly assert violations of collectively bargained rights through employee grievances. Remedies of violations of contract rights through mitigation of the penalties to employees whose rights were violated, is consistent with Congress' intent to eliminate multiple appeals based on the same facts, and with practice in private sector and non-federal, public sector arbitration. Additionally, the alternative remedies suggested by petitioner would be ineffectual. Thus, the lower court properly affirmed the arbitrator's reduction of the penalty to the grievants as a remedy for the agency's violation of important contract procedural rights.

ARGUMENT

I. THE COURT BELOW PROPERLY HELD THAT AN ARBITRATOR MAY MITIGATE A PENALTY WHEN AN AGENCY HAS VIOLATED SIGNIFICANT CONTRACTUAL PROCEDURAL SAFEGUARDS, REGARDLESS OF WHETHER THE VIOLATION WAS PERSONALLY PREJUDICIAL TO THE PARTICULAR EMPLOYEE

A. The Violation Of Important Contract Rights Was Properly Held To Be Harmful Error Within The Meaning Of The CSRA

Title VII of the CSRA imposes on federal agencies and unions representing their employees a "broadly defined duty to bargain over conditions of employment" especially with regard to procedural matters; *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1285 (D.C. Cir. 1983); *Department of Defense Army-Air Force Exchange Service* v. *FLRA*, 659 F.2d 1140, 1146 (D.C. Cir. 1981). This obligation includes the duty to negotiate employee procedural rights relating to adverse actions, such as the right to notice of adverse action within a limited period of

time and the right to be notified of one's right to union representation, at issue here. *Ibid. See, also, Veterans Administration Medical Center, Tampa, Florida* v. *FLRA*, 675 F.2d 260 (11th Cir. 1982); *National Treasury Employees Union* v. *FLRA*, 712 F.2d 699 (D.C. 1983).

In the instant case the agency and the union did negotiate significant procedural rights for employees who become the subjects of adverse actions (Pet. App. 12a, 22a-23a, 33a) and the arbitrator observed that the Agreement provided greater procedural protections for the agency's employees than did the CSRA (*id.* at 33a). Finding the agency's violations of these rights to be pervasive, he decided that mitigation of the penalties imposed was necessary to effectuate the contract. He did not reverse the adverse actions; rather he reduced the penalties as an appropriate remedy for the procedural violations committed by the agency.

The Federal Circuit held that the arbitrator's award was consistent with the CSRA's harmful error provision, and deferred to the arbitrator's interpretation and application of the agreement, in accordance with well-established principles of federal labor relations law. *United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 363 U.S. 578 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 591, 596 (1960). This Court has recently reaffirmed those principles, stating, "a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. . . . Unless the arbitral decision does not dra[w] its essence from the collective bargaining agreement, a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous." *W. R. Grace and Company* v. *Local 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, ——

U.S. ——, 103 S. Ct. 2177, 2182 (1983) (citations omitted).[6]

By providing for binding arbitration of adverse action appeals, Congress was acting with full awareness of the well-established policy of deference to arbitration awards. The Court of Appeals for the D.C. Circuit, in a comprehensive decision, examined the language and history of the CSRA, the "Steelworkers" cases, and similarities as well as differences between private sector and federal sector labor relations, and it concluded that "the policies favoring extremely limited judicial review of arbitrator's decisions are fully applicable in the Federal sector." *Devine* v. *White*, 697 F.2d 421, 440 (D.C. Cir. 1983).

In the instant case, it is not disputed that the agency and the union had properly negotiated certain important procedural rights for employees subjected to adverse actions. Nor is it disputed that the agency was guilty of pervasive violations of the grievants' procedural rights, that those violations were harmful to the interests of the agency's employees and their union, and that the arbitrator's award drew its essence from the Agreement. However, the petitioner claims that the Federal Circuit's affirmation of the arbitrator's award was improper because of a supposed conflict with the MSPB's interpretation of the "harmful error" rule. Petitioner is, however, in error. There is no necessary inconsistency between the MSPB rule and the arbitrator's ruling below; to the extent that they differ at all, it is because different interests are present in the two forums, and the variance is entirely permissible.

---

[6] Of course, as petitioner has noted (Pet. Br. 17, n.14), the Court in *W.R. Grace* held that arbitral awards which are contrary to public policy are unenforceable in federal court. *W.R. Grace and Company, supra*, 103 S.Ct. at 2183 (citation omitted). We submit that, in the instant case, the arbitrator's award is fully consistent with law and public policy as expressed in the "Steelworkers" cases and, to the extent relevant, as enunciated by the MSPB. *See* discussion *infra* at *12-13*.

Section 7701(c)(2) of the Act provides that an adverse action may not be sustained if the employee "shows harmful error in the application of the agency's procedures in arriving at such decision."[7] The MSPB will overturn an adverse action based upon a procedural violation only when the employee shows that, in the absence of the violation, the agency might have reached a different result, or when the error caused "substantial harm or prejudice" to the employee's rights.[8]

Both the arbitrator and the court below applied the statutory harmful error rule. In doing so, however, they took account of the substantial harm to the right of all employees in the bargaining unit caused by the employer's due process violations. To do so does not conflict with the MSPB's rule; it merely addresses interests which are not properly before the MSPB. The MSPB adjudicates employee appeals of adverse actions. This statutory appeal remedy exists for individual employees. Arbitrators, on the other hand, are confronted not only with those individual rights, but also with the contract rights of all employees in the bargaining unit.[9]

---

[7] The harmful error rule applies only to agency procedures. 5 U.S.C. 7701(c)(2)(A). The statute provides two other independent grounds for reversal of adverse action, not at issue in this case: a showing that the action was based on a prohibited personnel practice under Section 2302(b) of the Act, or a showing that the decision was not in accordance with law. 5 U.S.C. 7701(c)(2)(B) and (C).

[8] The MSPB has, by regulation, interpreted this provision to mean:

> Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, *i.e.*, caused substantial harm or prejudice to his/her rights.

5 C.F.R. 1201.56(c)(3). *See also, Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980).

[9] While the MSPB may consider contractual rights in deciding an employee's appeal, *Stalkfleet v. United States Postal Service*, 6

The union is, as the court below noted, a major party, "if not *the* major party," to arbitration. (Pet. App. 12a). Only the union (or the agency), not the individual employee, may invoke arbitration. The collective bargaining agreement is the necessary underpinning of the arbitrator's authority, and it may provide for protections beyond those granted by statute. Resolution of any contract dispute potentially concerns not only the grievant, but all of the employees represented by the union and covered by the contract. Accordingly, the arbitrator's concern for the interests of all unit employees with respect to contract rights is a necessary part of his function. He therefore properly considers those interests when applying the harmful error rule, as the arbitrator and the court below did. Both held that "[v]iolations of explicit and important procedural rights" occurred here, which amounted to harmful error. (Pet. App. 14a.)[10] No inconsistency with the MSPB is presented, since that body has no occasion to consider the rights of the employees at large; before it are only the statutory rights of the appellant employee.

Neither the statutory language nor the legislative history suggests that harm to employees at large is not a proper concern of arbitrators. The statute provides only that harmful error in the application of agency procedures will be cause for reversal of an adverse action. The statute does not specify who must suffer the harm, the amount of harm necessary for a finding of "harmful error", or that a violation be, as petitioner characterizes

---

M.S.P.B. 536 (1981), it is not bound, as arbitrators are, to give effect to these rights and it does not have the expertise that arbitrators do in interpreting collective bargaining agreements.

[10] Contrary to petitioner's implication (Pet. Br. 18-19), the Court did not suggest that mere presence in the contract renders a right important. On the contrary, the court regarded the rights at issue here as on their face "significant." (Pet. App. 14a).

it, "outcome-determinative" as a prerequisite for a finding of harmful error.[11]

Moreover, contrary to the assertions of petitioner, the legislative history of the CSRA does not dictate an interpretation of the harmful error rule different from that applied below. Petitioner relies on the Senate Report, S. Rep. 95-969, 95th Cong., 2d Sess. (1978), in asserting that there can be a finding of harmful error "only if the procedures followed substantially impaired the rights of the employees." Pet. Br. 16 *quoting* S. Rep. 95-969, *supra* at 64. First, it should be noted that the court below held that the procedural violations committed here *did* substantially impair the rights of all employees. However, if the Senate Report referring to the substantial impairment standard is read to require an outcome-determinative test, then it must be remembered that the Senate Report echoed the very language of the original Senate bill (S. 2640, Section 7701(d)(2); *id.* at 183), which was ultimately rejected.[12] The provision ultimately enacted as Section 7701(c)(2)(A) omitted the limitation

---

[11] Interestingly, even the Senate version of the bill did not dictate the outcome-determinative test proposed by petitioner. If an employee's rights were "substantially impaired," there would be harmful error. The MSPB rule goes further to ask whether "absence or cure of the error might have caused the agency to reach a conclusion different than the one reached." 5 C.F.R. 1201.56.

[12] The statute also does not expressly require that arbitrators apply the harmful error provision. Section 7121(e)(2) requires arbitrators to apply the statutory burdens of proof (at Section 7701(c)(1)) but does not explicitly require application of the harmful error rule (Section 7701(c)(2)). However, the lower courts have held that arbitrators must apply the rule because Section 7701(c)(1) is expresaly subject to Section 7701(c)(2) and because different standards of proof would promote forum shopping. *Devine v. White, supra*, 697 F.2d at 441; *Devine v. Nutt* (Pet. App. 10a).

that harmful error may be found only when there is substantial impairment of the rights of the employee.[13]

Additionally, the other passages of the Senate Report cited by petitioner are not persuasive as to the requirement of an outcome-determinative test. Many of the passages cited by petitioner refer to streamlining the removal of federal employees. Pet. Br. 18-20. However, those passages are concerned primarily with expanding the grounds for removal of incompetent employees, not with reducing the procedural appeal rights of federal employees. S. Rep. 95-969, *supra*, 3-4, 9, 19, 51, 54. The passages which address problems with employee appeals based on procedural grounds are concerned with reducing the complexity of the appeals process, S. Rep. 95-969, *supra* at 9, and eliminating reversals of agency actions "because of technical procedural oversights." *Id.* at 54.

Here the arbitrator did not reduce the penalties to the grievants based on mere technical procedural oversights. He explicitly rejected an undue "emphasis on technicalities" but he specifically found that there were pervasive violations of significant procedural rights (Pet. App. 38a). Furthermore, given his finding that the agency had proved cause for adverse action against the grievants, the arbitrator stated that the procedural violations will not "render the action void." He therefore reduced the penalties to lesser adverse actions (Pet. App. 36a, 38a-39a). Thus, to the extent that Congress intended to eliminate reversals of agency actions based on procedural technicalities, the instant award is not inconsistent with that purpose.

---

[13] As petitioner notes (Pet. Br. at 16 n.2) the Joint Explanatory Statement of the Committee on Conference (H.R. Rep. 95-1717, 95th Cong., 2d Sess. (1978)) did not explain this change in the wording of the harmful error provision. But the lack of explanation is not a basis for importing the intent of the original Senate bill into the statute ultimately enacted when the Senate version was specifically rejected and was replaced by a less limiting provision.

In sum, the legislative history of the CSRA does not require, as petitioner argues, that an adverse action may be overturned on procedural grounds only if a different decision might have been reached, but for the violation. Given the plain language of the statute's harmful error provision, the statute's broad mandate for collective bargaining (especially on procedures), and traditional federal policy favoring arbitration as a labor dispute resolution mechanism, the Federal Circuit correctly held Arbitrator Nutt's award to be consistent with the harmful error provision of the CSRA.[14]

B. Even If The MSPB Rule Dictated A Different Result, The CSRA Does Not Require That Arbitrators And The MSPB Apply Identical Interpretations Of The Harmful Error Rule

As we noted above (at footnote 12), the CSRA does not explicitly require arbitrators to apply the harmful error rule; the lower courts have inferred this requirement from their readings of Sections 7121(e)(2) and 7701(c)(1) and from the legislative history of the Act. *Devine* v. *White*, *supra*, 697 F.2d at 441; *Devine* v. *Nutt* (Pet. App. 10a-11a). While it may be an appropriate reading of the statute to require that arbitrators apply the harmful error rule as part of their obligation to apply

---

[14] The arbitrator's application of the harmful error rule is also consistent with the interpretation of similar rules in analogous contexts. In *United States* v. *Hasting*, —— U.S. ——, 103 S.Ct. 1974 (1983), cited by petitioner at page 16 of its brief, the Court rejected a *per se* rule of "automatic reversal" of convictions in cases where there had been violations of the defendant's due process rights. Finding the violation "harmless error" the Court reversed a lower court order for a new trial. However, the Court also stated that "certain errors may involve rights so basic to a fair trial that their infraction can never be treated as harmless error." *Ibid.* at 1980 n.6, *quoting Chapman* v. *California*, 386 U.S. 18, 23 (1967). Here the arbitrator found pervasive procedural violations of basic employee rights and therefore, in effect, concluded that the violations were not "harmless error."

the same burdens of proof as the MSPB, there is no basis in the statute for requiring them to interpret and apply the rule in the same manner as the MSPB.[15]

To the extent that there is a difference between the harmful error rule as applied by the MSPB and as applied by arbitrators, it is not an impermissible difference. Congress did intend that arbitrators and the MSPB would apply the same burdens of proof and standards of review to "promote consistency . . . and to avoid forum shopping," H.R. Rep. 95-1717, *supra* at 157. But as was discussed above, it also sought to promote collective bargaining in the federal sector and provided for arbitration of disputes arising under collective bargaining agreements. The courts of appeals, which are charged with ensuring that both MSPB and arbitration decisions comply with the provisions of the Act, have harmonized the twin purposes of promoting consistency between arbitration and the MSPB and encouraging collective bargaining and arbitration of contract disputes by holding that arbitrators are bound by the statutory burdens of proof and standards of review but that they are not obliged to follow MSPB precedents concerning those standards of review, particularly when they are interpreting provi-

[15] Petitioner's assertion that the Board's interpretation of the harmful error rule is "due considerable deference, as opposed to an arbitrator's interpretation of the rule," (Pet. Br. 16) is without basis. The CSRA has created arbitration and the MSPB as parallel appeal routes and "set[] arbitration on a par with administrative review before the MSPB." *Local 2578, American Federation of Government Employees v. General Services Administration*, 711 F.2d 261, 265 (D.C. Cir. 1983); *National Treasury Employees Union v. FLRA, supra*, 712 F.2d 676. To prevent impermissible inconsistencies, Congress has charged the Federal Circuit with providing the necessary uniformity in reviewing both MSPB decisions and arbitral awards of adverse actions. Here, the Federal Circuit applied the harmful error rule, noting no inconsistency with MSPB case law.

sions of a collective bargaining agreement.[16] The D.C. Circuit in *Devine* v. *White*, *supra*, noting that defining harmful error is necessarily a subjective determination, stated that the MSPB's interpretation of harmful error "is not the only possible reading of the standard" particularly when a claimed procedural error involves "a violation of a clear provision of a collective bargaining agreement." 692 F.2d at 442-443. In *Local 2578 American Federation of Government Employees* v. *General Services Administration*, 711 F.2d 261, 264 (D.C. Cir. 1983), the court stated "nothing in the CSRA requires that arbitration and MSPB actions always adhere to the same standards and procedures or produce the same results in like cases." In *Devine* v. *Sutermeister*, 724 F.2d 1558, 1565 (Fed. Cir. 1983), the court stated "There is no conflict between the quoted passages from the legislative history of the CSRA [many of the same passages cited in the Brief for Petitioner herein] and the proposition that an arbitrator is not bound by MSPB precedents". The court further stated that the cited passages were "addressed to specific statutory provisions that cannot be read to support OPM's position that an arbitrator is bound by MSPB precedents. If anything, the absence of any statutory support for such a position produces a negative inference." *Ibid.* Even in *Devine* v. *Pastore*, 732 F.2d 213 (D.C. Cir. 1984), on which petitioner relies in claiming that arbitrators are bound by MSPB interpretations of the CSRA (Pet. Br. 17), the court held that arbitrators must apply the same standards as the MSPB, but observed that Congress only sought to promote "rough uniformity" in the review of agency disciplinary actions and are stated that "we do not suggest that the arbitrator

[16] Both the D.C. Circuit and the Federal Circuit have held that agencies and unions representing their employees may not contractually agree to eliminate the harmful error rule—*i.e.*, they may not agree to a *per se* rule that a procedural violation must result in reversal of the action. *Devine v. Brisco*, 733 F.2d 867 (Fed. Cir. 1984), *Devine v. Pastore*, 732 F.2d 213, 216 (D.C. Cir. 1984).

must conduct an examination of the MSPB case law, in the manner of a common law judge, to assure himself that the outcome of his determination is similar to the MSPB case closest on its facts." *Id.* at 218-219. Thus, the Courts of Appeals have given effect to both Congress' intent to promote consistency between arbitration and the MSPB and its intent to encourage collective bargaining and arbitration as the means of resolving labor disputes.

II. THE *NUTT* DECISION DOES NOT CREATE IMPERMISSIBLE DIFFERENCES BETWEEN RIGHTS OF ORGANIZED AND UNORGANIZED EMPLOYEES

Petitioner complains that the court of appeals' decision allows impermissible differences to exist between the rights of members of collective bargaining units and non-unit employees. According to petitioner (Pet. Br. 20-22), by permitting a different harmful error interpretation in arbitration proceedings, which are available to bargaining unit members, than is permitted in MSPB proceedings, which constitute the only review available to non-unit employees, the court of appeals condones "unfair, disparate treatment," depending on union representation. Petitioner concludes that this difference "virtually guarantees" forum shopping for bargaining unit employees who have a choice between arbitration and MSPB proceedings. *Ibid.*

First, we emphasize that Congress obviously contemplated different procedural opportunities and protections for federal employees, depending on bargaining unit membership. Inherent in the traditional rights to organize and negotiate is the right to negotiate procedural rights attendant to disciplinary actions and provisions for arbitration of such actions. 5 U.S.C. 7106(b)(2) and 7121(b)(3)(C). Through the CSRA, Congress encouraged federal employees within bargaining units to negotiate rights and protections beyond the statutory

rights.[17] A collective bargaining agreement may provide many procedural advantages to bargaining unit employees which are not available to non-unit employees, such as the right to be informed of one's right to union representation, at issue here, and the right to a stay of disciplinary action pending adjudication of a grievance by an arbitrator. *See Veterans Administration v. FLRA*, 675 F.2d 260 (11th Cir. 1982) (stays of personnel actions pending arbitral decision are negotiable). Thus, it is of no relevance that federal employees who are not represented by unions may have fewer procedural protections than those who are so represented. Such distinctions are not impermissible, but rather were wholly intended by Congress. But let it be remembered that the advantage which accrues to employees who are organized is the *fact* of a collective bargaining agreement, with the rights it guarantees. If that advantage, including the streamlined dispute-resolution mechanism of arbitration, encourages employees to organize and collectively bargain, then so be it. Such a result was clearly contemplated by Congress. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, *supra*, 104 S.Ct. at 441, 449.

Second, as we have shown, the application of a harmful error standard broader in arbitration than in MSPB proceedings does not violate Congressional intent. It merely takes account of the rights of employees at large, in addition to the right of the particular grievant. To suggest, as petitioner does repeatedly, that the principles enumerated by the court below "eviscerate" the harmful error rule (Pet. Br. 18-20), is to ignore the fact that the employer's repeated due process violations

---

[17] Besides producing different rights for organized and unorganized employees, the give-and-take of the collective bargaining process will necessarily produce different rights for organized employees in different bargaining units.

were unquestionably harmful to all bargaining unit employees.[18]

III. VIOLATIONS OF THE RIGHTS OF EMPLOYEES IN GENERAL ARE PROPERLY CORRECTED THROUGH THE GRIEVANCE-ARBITRATION MECHANISM

Petitioner grudgingly acknowledges that the union has an interest that "may be implicated when collective bargaining agreement provisions are violated." Pet. Br. 25. It contends, however, that that interest must be vindicated in procedures "distinct" from the kind of arbitration that took place below. *Ibid.* Petitioner conveniently ignores the CSRA's express prohibition of multiple appeals based on the same facts in different forums. *See* 5 U.S.C. 7116(d) and 7121(e). *See also* S. Rep. No. 95-969, *supra* at 107. The aforementioned legislative history of the CSRA demonstrates Congressional intent to avoid repetitious litigation in different forums generated from the identical factual situation. Petitioner's proposition that the union should invoke separate arbitration,

[18] The MSPB has said that it too will consider whether provisions of labor contracts have been violated. The Board, in likening labor contracts to agency regulations, has described such contracts as having "established nondiscretionary policy under which the agency operates." *Giesler v. Dept. of Transportation*, 3 M.S.P.B. 367, 368 (1980), *aff'd*, 686 F.2d 944 (10th Cir. 1982). As yet, the Board has not found a contract violation, and thus has had no occasion to consider the harmful error rule in that context. *Id.*; *Stalkfleet v. U.S. Postal Service*, 6 M.S.P.B. 536 (1981); *Letenyei v. Dept. of Transportation, FAA*, —— M.S.P.B. ——, *aff'd*, 735 F.2d 528 (Fed. Cir. 1984). Although there is no reason to doubt that the MSPB will apply the harmful error rule in such cases as it has in others, it must be emphasized that in no event would the MSPB be called upon to consider or adjudicate the rights of the employees at large under the collective bargaining agreement. The union is not a party before the MSPB, nor are employees at large otherwise represented in such proceedings. Therefore, the question of harm to the entire bargaining unit would simply be irrelevant in an MSPB proceeding.

and file separate unfair labor practice charges in order to enforce its own rights, notwithstanding an identity of facts with the employees' grievances, would result in duplicative administrative proceedings, substantial unnecessary costs to both agencies and unions, great waste of time and energy of federal employee participants, and additional judicial appeals from the multiple administrative adjudications to an already overburdened appellate judiciary.

Moreover, petitioner sets up a false distinction, as we have noted, between the grievant and his/her union. Although petitioner correctly notes that it is the individual employee who determines whether to use the negotiated grievance procedure (Pet. Br. 23), petitioner ignores that arbitration is peculiarly the union's device. The union is not only the employee's representative in arbitration, it is the party which invokes and conducts the proceeding. Its interest, which is in reality the interest of *all* employees, is properly cognizable in the arbitration proceeding.[19]

As a party to the negotiated agreement and as the one seeking its enforcement through arbitration, "[t]he union is a major (if not *the* major) party to the arbitration and its proper interests are to be protected" (Pet. App. 12a). AFGE and GSA agreed in the instant contract to institute procedures that provide employees with union representation at investigatory interviews and timely notice of proposed adverse action within a reasonable period after the offense or the Agency's discovery of it. The procedural safeguards that the Agency agreed to, and then pervasively violated in this case, were properly deemed by the arbitrator and the lower court to be important union rights that must also be enforced

[19] The union is accountable, pursuant to the duty of fair representation, to represent the interests of all employees without hostility to any. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-338 (1953). *See also* 5 U.S.C. 7114(a)(1).

through the negotiated grievance procedure,[20] "even though the particular grievants may not have been themselves adversely affected" (*id.* at 12a). "If . . . the employee must always show harmful error in the sense that his own case is prejudiced, then the procedures arrived at through collective bargaining become meaningless." *Devine v. White*, *supra*, 697 F.2d at 446 (Bork, J., concurring).

The Federal and D.C. Circuits are clearly justified in interpreting the harmful error clause as allowing a remedy for violations of important union rights, *i.e.*, those collectively negotiated for all unit employees, regardless of the impact on the particular case. Petitioner's approach artificially separates a union from its members. A union is its membership; it negotiates due process rights as the mutual rights of all individual unit employees. Due to the very nature of the arbitration process, the union on behalf of all members is the proper party to assert and enforce those rights. It is therefore appropriate to mitigate a disciplinary action tainted by significant violations of important contractual procedural safeguards in order to protect the collective interests of the union membership and to ensure that such violations are not repeated.[21]

---

[20] An arbitrator's interpretation of a particular contractual provision is precedential at least with respect to the application of the provision to other employees covered by the contract, as illustrated by Nutt's reliance on an earlier arbitration decision concerning the employee's right to union representation at interviews where disciplinary action may result (Pet. App. 33a). Therefore, it becomes even more important for the union to remedy a violation against the interests of all bargaining unit employees through an award for an individual grievant.

[21] Contrary to petitioner's suggestion (Pet. Br. 24), it is not in the least anomalous that an employer is sometimes prevented from taking action against an unworthy employee. Such is the necessary result if an employer transgresses important statutory, regulatory, and contract rules. Just as a litigant who ignores the

In the private sector, where there is no statutory harmful error rule, arbitrators frequently mitigate management action on account of violations of due process procedures contained in the collective bargaining agreement. For instance, in *General Telephone Co. of California and CWA*, 78 LA 793 (1982), an arbitrator concluded that the employer could not seek to enforce one company policy—prohibition against consumption of alcohol during an employee's shift—where another equally relevant company policy—the right to union representation at investigatory meetings—was violated. *See also United Rigging & Hauling, Inc. and Teamsters, Local 639*, 79 LA 640 (1982). *Cf. Newport News Shipbuilding & Dry Dock Co. and Steelworkers, Local 8888*, 78 LA 921 (1982) ("a remedial issue of first rank importance" requiring an analysis of whether under all the evidence discharges should be set aside or mitigated in order to assure adequate compliance with critically important due process policies; discharges sustained).

Even in the non-federal public sector, arbitrators will mitigate disciplinary penalties on account of significant violations of due process procedures. In *Fort Wayne Community Schools and AFSCME, Local 561*, 78 LA 928 (1982), an arbitrator found that the employer's contract violation and procedural error so seriously tainted the propriety of the discharge that arbitral disturbance of the penalty was warranted. The employee was reinstated but without back pay. *See also City of Sterling Heights and Teamsters, Local 214*, 80 LA 825 (1983).

Thus, consistent with arbitration practices generally,[22] when an arbitrator finds significant and pervasive violation of contractual due process procedures, as in this

---

statute of limitations loses a meritorious claim, so does an employer who violates procedural requirements. *See, e.g.*, MSPB cases *infra* at n. 23.

[22] *See* F. Elkouri & E. Elkouri, *How Arbitration Works*, 632-33 (3rd ed. 1979).

case, mitigation of the penalty is appropriate.[23] Enforcement of bargained for rights is crucial to fulfilling the CSRA's objectives, as outlined above. Eroding these contractual procedural safeguards "by applying MSPB's monolithic 'harmful error' standard would thus be inconsistent with Congress' desire to ensure that the federal government, as well as the private sector, received the benefits that flow from collective bargaining." *Devine v. White, supra*, 697 F.2d at 443 (footnote omitted). *See* 5 U.S.C. 7101(a).

It is thus clear that grievance arbitration properly contemplates vindication of both individual and collective rights, and that it would be wasteful and redundant to conduct multiple arbitrations on the same contract violations. Moreover, if the union was forced to engage in a separate arbitration to enforce what petitioner perceives to be solely union rights, without considering the individual grievances, the likely remedy would be a cease and desist order. Such relief does not correct the past

[23] When the MSPB finds harmful error due to statutory due process violations, it vacates the discipline entirely rather than mitigating the penalty. *White v. Dept. of Treasury*, 4 M.S.P.B. 11 (1980); *Morrow v. Dept. of Army*, 4 M.S.P.B. 494 (1980); *Kerr v. Nat'l Endowment of the Arts*, 5 M.S.P.B. 299 (1981); *Ratley v. Dept. of Army*, 11 M.S.P.B. 564 (1982). Comparable to criminal law where charges against suspects are dismissed for harmful due process error by police, the MSPB completely exonerates employees because of harmful due process error by the employing agency without even considering mitigation as an option.

Petitioner's assertion that the agency can begin new disciplinary proceedings after an MSPB reversal for procedural violations, but could not do so in other circumstances, is speculation built on dubious precedent (Pet. Br. 24). There is no indication whether that pre-CSRA rule, stated in *Ryder v. United States*, 585 F.2d 482, 489 (Ct. Cl. 1978), will be applied under the Civil Service Reform Act, either by the MSPB or the Federal Circuit. And, although not at issue here, there is no authority for the proposition that a different rule should obtain when an arbitrator has mitigated a penalty.

actions of the agency, and would be particularly ineffective where contract violations were found to be pervasive, as in the instant case. With respect to the filing of an unfair labor practice charge, the FLRA will refuse to issue a complaint unless the agency has committed a "clear and patent" repudiation of the negotiated agreement. *Dept. of Agriculture, Food Safety and Quality Service and AFGE, Local 2490*, 7 F.L.R.A. 665, 672-73 (1982). *See also IRS, Detroit District and NTEU, Chapter 24*, 12 F.L.R.A. 445 (1983). Usually such an unfair labor practice occurs only when the breach is persistent and constitutes a unilateral change from the clear language of the bargaining contract. Petitioner also cites approvingly *Food Safety and Quality Service, supra* (Pet. Br. 26), but fails to disclose that the FLRA concluded therein that contract disputes are more appropriately resolved through grievance arbitration procedures.[24] *See also Social Security Administration and AFGE, Local 1923*, 15 F.L.R.A. 614, 622 (1984). Indeed, FLRA case law over the last six years indicates that unfair labor practice findings for clear and patent breach of contract are rare, precisely because the contractual dispute resolution mechanism is the more appropriate forum.

[24] In the instant case, the FLRA declined to issue an unfair labor practice charge based on the Agency's failure to advise the grievants of their right to union representation during interrogation because it concluded that "the dispute in this case involves differing and arguable interpretations of the contracts' intent and meanings, and should therefore appropriately be resolved through the parties' negotiated grievance/arbitration procedures, rather than in the unfair labor practice forum" (Pet. Reply Mem. App. 6a). The FLRA did issue an unfair labor practice complaint against the Agency for imposing a "gag order" after the employees' interrogations (Pet. App. 27a, 30a). The complaint was not alleging a patently clear breach of contract in violation of the duty to bargain, as petitioner would have the Court believe (Pet. Br. n.25), but rather interference with and restraint of an employee's exercise of his rights under the statute. 5 U.S.C. 7116(a)(1).

In sum, the Federal Circuit's decision furthers government effectiveness and efficiency by permitting an arbitrator in a single adjudication to both consider the merits of an individual grievance and preserve the vitality and integrity of provisions of collective bargaining agreements important to both parties in the bargaining process.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

H. STEPHEN GORDON
General Counsel

PATRICK J. RILEY
Deputy General Counsel

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES
1016 16th Street, N.W.
Washington, D.C. 20036
(202) 862-4400

LOIS G. WILLIAMS
Director of Litigation

RICHARD S. EDELMAN
Assistant Counsel

NATIONAL TREASURY
EMPLOYEES UNION
1730 K Street, N.W.
Suite 1101
Washington, D.C. 20006
(202) 785-4411

December 1984

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
DEC 19 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

ALLISON E. NUTT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR RESPONDENTS

CHARLES A. HOBBIE *
Staff Counsel

MARK D. ROTH
General Counsel
American Federation of
Government Employees, AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005
(202) 737-8700

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, in federal sector adverse action proceedings brought to arbitration pursuant to 5 U.S.C. 7121(e), an arbitrator may properly take into account in making the ultimate award violations of the governing collective bargaining agreement which are raised by the union on its own behalf as a party to the arbitration?

TABLE OF CONTENTS

	Page
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	2
SUMMARY OF ARGUMENT	11
ARGUMENT:	
IN FASHIONING AN AWARD IN FEDERAL SECTOR ADVERSE ACTION ARBITRATION PROCEEDINGS, AN ARBITRATOR PROPERLY CONSIDERS VIOLATIONS OF THE GOVERNING COLLECTIVE BARGAINING AGREEMENT WHICH ARE HARMFUL TO THE UNION	13
A. The Award Is Properly Affirmed Because It Accords With The Language And Scheme Of The Act, And Is Based On The Arbitrator's Considered Interpretation Of Contractual Provisions	13
B. The Court Below Correctly Apprehended The Act To Authorize Arbitrators To Take Account Of Significant Violations Of The Collective Bargaining Agreement, Important To The Union, Even Though The Particular Grievants May Not Themselves Have Been Directly Prejudiced	30
C. The Appealed-From Decision Does Not Occasion Impermissible Differences In Appeal Rights Under Title II And Title VII	33
D. Congress Intended Federal Sector Arbitration To Reflect The Important Characteristics Of Arbitration In Private Sector Labor Relations	35
E. Effective And Efficient Government Is Effectuated Under The Act By Single Adjudications In Which Arbitrators May Resolve All Issues Affecting Union And Employee Parties Arising From Identical Facts	39
CONCLUSION	43

TABLE OF AUTHORITIES

CASES: Page

Alhambra Foundry Co., Ltd. v. General Warehousemen's Union, Local 598, 687 F.2d 287 (9th Cir. 1982) 36
Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970) 37
Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority, —— U.S. ——, 104 S.Ct. 439 (1983) 13, 17, 20, 28, 31, 39
Department of Defense, Army Air Force Exchange Service v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), *cert. enied*, 455 U.S. 945 (1982) 31, 34
Devine v. Brisco, 733 F.2d 867 (Fed. Cir. 1984) — 25, 32, 33, 34
Devine v. Goodstein, 680 F.2d 243 (D.C. Cir. 1982) 5
Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983) 5, 35
Devine v. White, 697 F.2d 421 (D.C. Cir. 1983) 5, 8, 25, 26, 28, 29, 31, 32, 33, 34, 37
Industrial Mutual Association, Inc. v. Amalgamated Workers, Local Union No. 383, 725 F.2d 406 (6th Cir. 1984) 36
International Brotherhood of Electrical Workers, Local Union No. 53 v. Sho-Me Power Corp., 715 F.2d 1322 (8th Cir. 1983) 36
Local 2578, AFGE v. GSA, 711 F.2d 261 (D.C. Cir. 1983) 35
Otherson v. Immigration & Naturalization Service, 711 F.2d 267 (D.C. Cir. 1983) 35
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 28, 37
United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960) 28, 37
United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 24, 28, 37, 39
United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960) 28, 34, 37

TABLE OF AUTHORITIES—Continued

Page

Veterans Administration v. Federal Labor Relations Authority, 675 F.2d 260 (11th Cir. 1982) .. 34
Vulcan-Hart Corporation v. Stove, Furnace, and Allied Applicance Workers International Union Local No. 110, 671 F.2d 1182 (8th Cir. 1982) 36

ADMINISTRATIVE CASES:

Internal Revenue Service and National Treasury Employees Union, 3 FLRA 479 (June 26, 1980) .. 41
Philadelphia Regional Office, District Office Operations, SSA and AFGE Local 3186, 15 FLRA 211 (July 2, 1984) 40

STATUTES AND REGULATIONS:

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 ..... 1, 5
5 U.S.C. 1201 *et seq.* 15
5 U.S.C. 1206(i) 35
5 U.S.C. 4303(e) 5
5 U.S.C. 7101(a) 17, 26, 28, 31, 35, 38
5 U.S.C. 7101(b) 22, 43
5 U.S.C. 7103(a)(9) 18, 19, 28
5 U.S.C. 7103(a)(12) 17, 28
5 U.S.C. 7103(a)(14) 17, 28
5 U.S.C. 7105(a) 26
5 U.S.C. 7106(a) 17
5 U.S.C. 7106(b) 20, 28, 30
5 U.S.C. 7106(b)(2) 17
5 U.S.C. 7116 39
5 U.S.C. 7116(a)(5) 17, 28
5 U.S.C. 7116(b)(5) 17, 28
5 U.S.C. 7116(d) 40, 41
5 U.S.C. 7118 39
5 U.S.C. 7121(a)(1) 1, 28
5 U.S.C. 7121(a)(2) 18
5 U.S.C. 7121(b)(3) 18, 28
5 U.S.C. 7121(b)(3)(A) 39
5 U.S.C. 7121(b)(3)(C) 5, 19, 20, 35, 38
5 U.S.C. 7121(d) 18, 19, 26

TABLE OF AUTHORITIES—Continued

	Page
5 U.S.C. 7121 (e) (1)	5, 18, 19
5 U.S.C. 7121 (e) (2)	19, 25
5 U.S.C. 7121 (f)	7
5 U.S.C. 7122 (a)	35
5 U.S.C. 7511 *et seq.*	15
5 U.S.C. 7513	15
5 U.S.C. 7513 (d)	5
5 U.S.C. 7701 *et seq.*	16
5 U.S.C. 7701 (a)	26
5 U.S.C. 7701 (c) (1)	17, 19, 25
5 U.S.C. 7701 (c) (1) (B)	25
5 U.S.C. 7701 (c) (2)	17, 19, 25
5 U.S.C. 7701 (c) (2) (A)	8, 13, 17, 26, 27
5 U.S.C. 7703 (d)	7
Public Law No. 95-454, Section 3, 5 U.S.C.A. 1101 note	14, 20
31 U.S.C. 1349 (b)	7
Executive Order No. 10988, 3 CFR 521 (1959-1963 Comp.)	14
Executive Order No. 11491, 3 CFR 861 (1966-1970 Comp.)	14
Executive Order No. 11616, 3 CFR 605 (1971-1975 Comp.)	14
Executive Order No. 11838, 3 CFR 957 (1971-1975 Comp.)	14
5 C.F.R. 1201.56 (c) (3)	26

MISCELLANEOUS:

	Page
Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231 (1977)	37
Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427 (1969)	37
F. Elkouri & E. Elkouri, *How Arbitration Works* (3d ed. 1973)	37
H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 157, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2891	25

TABLE OF CONTENTS—Continued

	Page
Robins, *The Presidential Address: Threats to Arbitration*, in ARBITRATION ISSUES FOR THE 1980s, PROCEEDINGS OF THE 34TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1 (J. Stern & B. Dennis eds. 1982)	27, 42
S. Rep. No. 95-969, 95th Cong., 2d Sess. (1978)	27, 42
124 Cong. Rec. 8468 (August 11, 1978)	20, 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1673

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

ALLISON E. NUTT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR RESPONDENTS

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111, and 5 C.F.R. 1201.56(c)(3) are set forth at Pet. Br. 2. Additionally, 5 U.S.C. 7121 provides in pertinent part:

> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the

procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance in the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

STATEMENT

The petitioned-from decision and arbitration award address the removals for misconduct of two Federal Protective Service (FPS) officers—Thomas Rogers and Robert Wilson, Jr. (the grievants)—employed by the General Services Administration (GSA or the Agency) at the Denver Federal Center, Denver, Colorado (Pet. App. 2a, 23a). American Federation of Government Employees, AFL-CIO, Local 3275 (AFGE or the union), as the exclusive representative of GSA and FPS employees at

the Denver Center, invoked expedited arbitration on behalf of the officer-grievants pursuant to the collective bargaining agreement between GSA and AFGE, and to 5 U.S.C. 7121(b)(3)(C) (*id.* at 4a, 21a).

Grievant Rogers was removed on charges of falsification of records, failure to report irregularities, and use of a government vehicle for non-official purposes (*id.* at 4a, 29a). Grievant Wilson was removed for falsification of tape recordings and attempting to conceal activities of record (*id.* at 4a, 28a-29a).

The charges were based on a sequence of incidents commencing on January 2, 1982, when Rogers was requested by his supervisor to pick up several cans of beer while on patrol in an official government vehicle. Rogers drove to his nearby home, picked up several cans of beer, and delivered the beer to his supervisor at the FPS command center. The supervisor later drank the beer and left the empty cans at the center when he went off duty (*id.* at 2a-3a, 24a-25a). Concerned that the unexplained presence of empty beer cans might lead to discovery of his drinking beer on duty, the supervisor subsequently telephoned Wilson, who was then on duty at the command post, and instructed him to alter the tapes which monitor communications between the post and patrolling FPS officers to include a false accounting for the empty cans (*id.* at 3a, 25a). Wilson complied with the request (*id.*).

Upon discovery of irregularities in the tapes by an FPS official on January 25, 1982, special agents of the GSA initiated an investigation (*id.* at 3a, 26a). Two agents confronted Rogers at his home and, after advising him that he was to be interrogated concerning a matter that might involve criminal misconduct and that he should consider the interrogation "non-custodial," interviewed Rogers at a local police station, taking copious notes (*id.* at 3a, 26a). Rogers was not informed that he was en-

titled to have a union representative present at the interview.[1]

The same agents subsequently interviewed Wilson in an identical fashion (*id.* at 3a-4a, 27a). As with Rogers, Wilson was not advised that he could have a representative present (*id.*). Other bargaining unit members were also interviewed by the agents at about the same time and were not given an opportunity to have a union representative present (*id.* at 27a). The agents, moreover, instructed the interviewed employees not to discuss the interviews with any other person, including union representatives (*id.*).[2]

On March 2, 1982, the agents again interviewed the grievants separately and asked them to sign affidavits prepared from the agents' notes of the earlier interviews. The grievants signed the affidavits as requested (*id.* at 4a, 28a).[3] As before, the grievants were not alerted to their right to union representation as specified in the collective bargaining agreement (*id.*).

The grievants were formally notified on April 2, 1982, nearly three months after the alleged misconduct, that GSA proposed to remove them (*id.*). After receiving the

[1] Article XXVII, Section 2 of the collective bargaining agreement between GSA and the grievants' union provides (*id.* at 3a n.2, 22a):

> The Employer agrees that during formal discussions where interrogation or written or sworn statements are taken from an employee, in connection with a charge that may result in disciplinary action against him, he will have the opportunity to have a representative present. It should be understood that counseling sessions are not formal discussions.

[2] The union filed an unfair labor practice charge with the Federal Labor Relations Authority based on the imposition of this "gag" rule. A complaint was issued and subsequently settled prior to a hearing.

[3] The arbitrator chose "to rely only" upon these affidavits in holding that the charged misconduct had been committed (*id.* at 31a-32a).

grievants' written responses to the charges, GSA issued a removal notice to each grievant in May, 1982, which was effective on or about July 12, 1982 (*id.* at 4a, 28a-29a). Under the terms of the negotiated agreement, the discipline imposed was stayed until five days after the conclusion of the arbitration (*id.* at 39a).

2. The Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111 (hereinafter "CSRA" or "Act"), entitles competitive service or so-called preference eligible federal employees who are subject to "adverse agency action"—including removal—to appeal to the Merit Systems Protection Board (MSPB). See 5 U.S.C. 4303(e) and 7513(d). Additionally, *any* employee who is a member of a bargaining unit may challenge adverse agency action through the applicable grievance and arbitration procedures of the collective bargaining agreement between his union and employer. See 5 U.S.C. 7121(e)(1), and see *Devine v. Goodstein*, 680 F.2d 243, 245 (D.C. Cir. 1982); *Devine v. White*, 697 F.2d 421, 428 (D.C. Cir. 1983); and *Devine v. Sutermeister*, 724 F.2d 1558, 1560 (Fed. Cir. 1983).

In the case at hand both officers opted to challenge their removals through the expedited grievance procedures of the collective bargaining agreement between GSA and AFGE. AFGE invoked arbitration pursuant to 5 U.S.C. 7121(b)(3)(C).

The arbitrator found that the grievants had committed the alleged acts of wrongdoing (*id.* at 4a, 32a).[4] Arbitrator Nutt concluded, however, that "the Agency did not give the Grievants an opportunity to have a [union] representative present during the investigation," as required by Article XXVII, Section 2 of the collective bargaining agreement (*id.* at 4a, 34a).[5]

[4] The arbitrator was respondent Nutt, now deceased. AFGE did not contest the facts before the arbitrator upon which the discipline was based.

[5] Article XXVII, Section 2, of the agreement is quoted, *supra*, p. 4, note 1.

The arbitrator also agreed with the union's contention that the agency had violated Article XXVII, Section 3 of a supplement to the collective bargaining agreement by permitting an unreasonable period of time to elapse between the date when the agency first learned of the subject misconduct and the issuance of the notices of proposed removal (*id.* at 4a-5a, 37a).[6]

The arbitrator found that the union did not claim or demonstrate any prejudice *to the grievants* due to this "inordinate" delay (*id.*). With respect to this clear contractual violation and to the "Agency's failure to provide the Grievants with the due process rights [of union representation] guaranteed them by the agreement," however, he ruled "that procedural requirements are important and that any failure to comply will be penalized, but will not thereby render the action void. This approach . . . will most likely assure the Agency's making certain that the contract is followed in the future" (*id.* at 36a). Arbitrator Nutt concluded that "[s]olely because of the agency's pervasive failure to comply with the due process requirements of the agreement, the removal of the Grievants from government service was not for just cause" (*id.* at 5a, 38a). As a consequence, the penalties imposed on the grievants were reduced by arbitrator Nutt from removal to two weeks' suspension without pay (*id.* at 5a, 38a-39a).

3. The Director of the Office of Personnel Management sought review of the arbitrator's decision by the United States Court of Appeals for the Federal Circuit, under

[6] That section provides, in pertinent part (*id.* at 5a n.4, 23a):

> PROPOSED NOTICE: In the event an employee is issued a notice of proposed disciplinary or adverse action, that employee must be afforded and made aware of all his/her rights. These proposed notices shall be served on the employee(s) within a reasonable period of time (normally 40 calendar days) after the occurrence of the alleged offense or when the alleged offense becomes known to management.

5 U.S.C. 7703(d) and 7121(f).[7] The court of appeals granted the petition for review, and a five-judge panel issued the appealed-from unanimous decision (*id.* at 1a-16a).

The court of appeals affirmed arbitrator Nutt's decision and award of a two-week suspension without pay with respect to grievant Wilson, holding that this award is entitled to finality and should be affirmed because it is consistent with law and draws its essence from the collective bargaining agreement (*id.* at 13a). Concerning the award to grievant Rogers, the court of appeals held that the arbitrator erred as a matter of law in mitigating grievant Rogers' removal to a two-week suspension in disregard of the one month suspension commanded by 31 U.S.C. 1349(b) (*id.* at 15a-16a). The court of appeals modified the award, with respect to Rogers, to a one-month suspension without pay, in accordance with 31 U.S.C. 1349(b) (*id.* at 16a).

[7] 5 U.S.C. 7703(d), which is applicable to awards of arbitrators involving adverse actions by operation of 5 U.S.C. 7121(f), reads in pertinent part (*id.* at 1a-2a n.1):

> (d) The Director of the Office of Personnel Management [OPM] may obtain review of any final order or decision of the [Merit Systems Protection] Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

Addressing the issue of the award's consistency with external law and regulations which was raised by the OPM Director's petition, the court of appeals specifically answered the question of whether and to what extent the "harmful error" standard—required by statute to be applied in MSPB review of agency action (*see* 5 U.S.C. 7701(c)(2)(A) (Pet. Br. 2))—must be employed in adverse action arbitration. The court of appeals agreed with the only other court of appeals which has addressed this question (see generally *White*, *supra*), holding that:

> (1) arbitrators should take account of "harmful error" in deciding whether a grievant was personally prejudiced, but
>
> (2) there can be violations of the collective bargaining agreement, not prejudicial to the particular grievant, that the union may raise on its own behalf in the grievance proceeding and which are to be taken into account in making the ultimate award, and
>
> (3) in this case there were such violations which the arbitrator properly took into account . . . even though those violations were not personally prejudicial to grievants Rogers and Wilson.

Pet. App. 10a.

In reaching the above holdings, the court of appeals first noted its agreement with its sister circuit in *White*, *supra*, 697 F.2d at 441, that:

> "harmful error" applies to determining whether the particular grievant has been prejudiced (even though we also think, as discussed below, that an arbitral award can nevertheless be based on collective bargaining violations important to the union but not prejudicial to the individual grievant).
>
> Because the "harmful error" provision can appropriately be regarded as part of the "standard of proof" (if not of the burden of proof itself) with respect to the individual grievant, it is proper to hold the arbitrator to the rule insofar as he decides the particular instance of the individual grievant.[12]

[12] Though § 7121(e)(2) of the Reform Act (Title 5, U.S. Code), *supra*, specifically incorporates only § 7701(c)(1), *supra*, the latter is made "Subject to paragraph 2 of this subsection" (i.e., § 7701(c)(2), the "harmful error" provision) and can therefore be read, in view of the legislative history, as likewise incorporating § 7701(c)(2).

Pet. App. 11a-12a.

The court continued by determining the proper impact on an award of an agency's violations of significant contractual rights which may not have prejudiced the individual grievants:

> [L]ike the *White* court, *supra*, 697 F.2d at 443, *see id.* at 446 (Bork, J., concurring), we also hold that the arbitrator can take account of significant violations of the collective bargaining agreement, important to the union, even though the particular grievants may not have been themselves adversely affected. The union is a major (if not *the* major) party to the arbitration and its proper interests are to be protected, even though the interests of the particular grievants may not, alone, call for protection. Congress so recognized the role of unions and collective bargaining agreements. The Reform Act expressly provides that management prerogatives shall not "preclude any agency and any labor organization from negotiating . . . procedures which management officials of the agency will observe in exercising [their] authority" to discipline and remove employees. 5 U.S.C. § 7106(b) (1982). In the contract here, the union and the agency agreed to institute procedures that provide employees with union representation at investigatory interviews and timely notice of proposed adverse action within a reasonable period after the offense or its discovery. These procedural safeguards, established by collective agreement, effectively become union rights. In the Reform

> Act, Congress also expressly provided that, in adverse action cases of this type, a "collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability" (5 U.S.C. § 7121(a)(1) (1982)), and recognized that, in matters of this kind raised under the negotiated grievance procedure, the union should be the representative and there should be binding arbitration (if necessary). 5 U.S.C. § 7121(b)(2)(b) (1982). We think this statutory scheme means that important *union* rights are also to be enforced in the negotiated grievance procedure.

Id. at 12a-13a [emphasis in original].

Specifically applying these principles to the award before it, the court of appeals noted the arbitrator's finding of a "pervasive failure to comply with the due process requirements of the agreement" (*id.* at 13a-14a) and arbitrator Nutt's opinion that such a "pervasive failure" justified mitigation (*id.*). In this regard, the court of appeals concluded, the award did not controvert any civil service law or regulation (*id.* at 14a). The court explained, furthermore, that:

> [T]he presence in the contract of these procedural safeguards concerning representation and notice is evidence of their substantiality and importance to the union and its members covered by the agreement. *See White, supra*, 697 F.2d at 443. They also appear, of themselves, to be significant measures for the union and its members. Viewed in this light, the arbitrator's decision to uphold and enforce the vitality of these provisions by, in effect, penalizing the agency for disregarding them was reasonable and within the scope of his authority. *See Enterprise Wheel & Car Corp., supra*, 363 U.S. at 597. Violations of explicit and important procedural rights contained in a contract, such as these, could fairly be said to be tantamount to "harmful error" to the union within the scope of 5 U.S.C. § 7701(c)(2)(A) (1982) for the purposes of collective bargaining arbitration to which the union is a proper party. *See White, supra*, 697 F.2d at 443; *id.* at 446 (Bork, J., concurring). For that reason, we cannot disturb the award as to Wilson.

Id. The arbitrator's mitigation of the grievants' penalties was sustained, accordingly, except to the extent that Rogers' penalty conflicted with statutory authority, as previously noted.

SUMMARY OF ARGUMENT

A. The appealed-from arbitrator's award is consistent with the balanced objectives of the new Act to strengthen the rights of employees and their unions while realizing for the federal sector the fruits of collective bargaining and promoting effective and efficient government. In considering pervasive violations of the collective bargaining agreement as grounds to mitigate the penalty imposed on the grievants, the arbitrator acted in accordance with the terms of the agreement he construed and with all applicable law.

In this regard the language of the Act fully supports application of the harmful error standard to procedural errors which are demonstrably prejudicial to the union. The Act's legislative history also supports the broad application of "harmful error" employed in the award. Congress' intent to promote collective bargaining and the arbitral process is clearly evinced in the language and scheme of the Act. Unions are important participants in these mechanisms. The due process rights negotiated by unions are appropriately protected to preserve the integrity of the collective bargaining process and to encourage resort to negotiated grievance procedures.

B. The court below correctly interpreted the CSRA in affirming the appealed-from award. Petitioner's contention that only procedural error which is prejudicial to a grievant—as opposed to a union—may be considered by an arbitrator renders the collective bargaining process

virtually meaningless. The courts of appeals have accurately determined that eroding the safeguards conceded to employees' representatives in the collective bargaining process by applying a monolithic "harmful error" standard is inconsistent with Congressional intent to maximize the benefits of collective bargaining.

C. The appealed-from decision creates no impermissible differences between Title II and Title VII appeal rights. Arbitration of disputes, by the very nature of the arbitral process, is different from the statutory dispute resolution process. Nothing in the CSRA requires that arbitrations and MSPB appeals *always* adhere to the same procedures and standards, or produce identical results in like cases.

D. Arbitration in the federal sector under the Act is intended to embody the vital characteristics of private sector arbitration, such as speed, informality, economy, and protection of the rights of the parties. These characteristics are lost, and the force and meaning of the contractual process are eviscerated, to the degree that arbitrators are forbidden by the CSRA to consider all contractual rights meaningful to the parties. Adoption by this Court of petitioner's position will substantially undercut the successful resolution of disputes by arbitrators.

E. Utilizing alternative statutory remedies to protect bargained-for rights of the union and its membership, as suggested by petitioner, would result in repetitious litigation in different forums, substantial unnecessary costs to both unions and the public fisc, great waste of the time and energy of federal employee participants, and additional judicial appeals from the multiple administrative adjudications to an already over-burdened appellate judiciary. The lower court's decision, on the other hand, furthers government effectiveness and efficiency by permitting an arbitrator in one adjudicatory process to preserve the vitality and integrity of contractual provisions important to the parties in the collective bargaining process.

ARGUMENT

IN FASHIONING AN AWARD IN FEDERAL SECTOR ADVERSE ACTION ARBITRATION PROCEEDINGS, AN ARBITRATOR PROPERLY CONSIDERS VIOLATIONS OF THE GOVERNING COLLECTIVE BARGAINING AGREEMENT WHICH ARE HARMFUL TO THE UNION.

The Act departed from the prior labor relations program in that, *inter alia*, a union may for the first time invoke arbitration, pursuant to negotiated grievance procedures, of adverse actions taken by an agency. The key issue in this case is the applicability in such proceedings of the "harmful error" standard set forth at 5 U.S.C. 7701(c)(2)(A).

In the appealed-from award the consideration by the arbitrator of "pervasive" violations of the collective bargaining agreement by the agency, as grounds for the mitigation of the penalties imposed on the grievants, is entirely consistent with the "harmful error" standard, the terms of the agreement, the roles of unions and arbitrations in the CSRA's overall scheme, and the CSRA's objectives. The court of appeals correctly affirmed the award on these bases.

A. The Award Is Properly Affirmed Because It Accords With The Language And Scheme Of The Act, And Is Based On The Arbitrator's Considered Interpretation Of Contractual Provisions.

1. The instant case involves the interplay of two titles of the CSRA, which is an act constituting "a comprehensive revision of the laws governing the rights and obligations of civil servants. . . ." *Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority*, —— U.S. ——, 104 S.Ct. 439, 441 (1983) (hereinafter "*BATF*"). The CSRA superseded various civil service statutes governing federal personnel management, as well as a program established in a 1962 Executive Order,

which had previously controlled labor-management relations in the federal sector.[8] The Act's Findings and Statement of Purpose establishes, among other purposes, Congressional intent: (1) to protect employees from wrongful personnel actions; (2) to strengthen the rights of employees, through their exclusive representatives, to bargain collectively concerning conditions of employment; and (3) to ensure at the same time the effective and efficient conduct of government.[9]

---

[8] Executive Order No. 10988, 3 CFR 521 (1959-1963 Comp.) The Executive Order program was revised and continued by Exec. Order No. 11491, 3 CFR 861 (1966-1970 Comp.), as amended by Exec. Orders Nos. 11616, and 11838, 3 CFR 605, 634 (1971-1975 Comp.) and 3 CFR 957 (1971-1975 Comp.).

[9] In pertinent part the Act's Findings and Statement of Purpose reads:

It is the policy of the United States that—

(1) in order to provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service, Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices;

(2) the merit system principles which shall govern in the competitive service and in the executive branch of the Federal Government should be expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business, and prohibited personnel practices should be statutorily defined to enable Federal employees to avoid conduct which undermines the merit system principles and the integrity of the merit system;

(3) Federal employees should receive appropriate protection through increasing the authority and powers of the Merit Systems Protection Board in processing hearings and appeals affecting Federal employees;

(4) the authority and power of the Special Counsel should be increased so that the Special Counsel may investigate allegations involving prohibited personnel practices and reprisals

The two titles of the CSRA relevant to this case are titles II and VII. Title II—CIVIL SERVICE FUNCTIONS; PERFORMANCE APPRAISAL; ADVERSE ACTIONS—included among its amendments to title 5, U.S. Code, the following pertinent parts:

1. A new chapter 12—MERIT SYSTEMS PROTECTION BOARD AND SPECIAL COUNSEL—5 U.S.C. 1201 *et seq.*, which amended section 202(a) to establish (1) the MSPB to hear and adjudicate all matters within the jurisdiction of the Board and (2) the Office of the Special Counsel to investigate, and seek corrective action concerning, prohibited personnel practices and other illegal activities;

2. A revised Subchapter II of Chapter 75—REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS—5 U.S.C. 7511 *et seq.*, which amended section 204(a) to establish statutory causal and procedural requirements for the taking by an agency of certain adverse actions against covered employees, as well as statutory rights of appeals to the MSPB for covered employees from such adverse actions; [10] and

---

against Federal employees for the lawful disclosure of certain information and may file complaints against agency officials and employees who engage in such conduct;

* * * *

(10) the right of Federal employees to organize, bargain collectively, and participate through labor organizations in decisions which affect them, with full regard for the public interest and the effective conduct of public business, should be specifically recognized in statute.

Section 3, Pub.L. No. 95-454, 5 U.S.C.A. § 1101 note.

[10] 5 U.S.C. 7513 reads:

(a) Under regulations prescribed by the Office of Personnel Management, an agency may taken an action covered by this

3. A revised Chapter 77—APPEALS—5 U.S.C. 7701 *et seq.*, which amended section 205 to establish statutory appellate standards and procedures governing employee appeals to the MSPB.[11]

---

subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

[11] 5 U.S.C. 7701 reads in pertinent part:

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. . . .

* * * *

[Continued]

Title VII of the Act—FEDERAL LABOR MANAGEMENT RELATIONS—sets forth the first statutory scheme governing labor relations between federal agencies and their employees. The new Act expressly declares that "labor organizations and collective bargaining in the civil service are in the public interest," 5 U.S.C. 7101(a), and requires federal agencies and unions representing their employees to bargain in good faith concerning terms and conditions of employment, with certain enumerated exceptions. 5 U.S.C. 7103(a)(12) and (14), 7116(a)(5) and (b)(5). Although an agency's authority to exercise specified management rights—such as the authority to discipline—is not subject to the duty to bargain, the *procedures* to be observed in exercising any management right are negotiable. See 5 U.S.C. 7106(a) and (b)(2); *BATF*, *supra*, 104 S.Ct. at 441.

5 U.S.C. 7121(a), quoted *supra*, 1-2, specifies that "any collective bargaining agreement shall provide procedures for the settlement of grievances . . . [which] shall be the exclusive procedures for resolving grievances . . . ," except that statutorily defined prohibited personnel prac-

---

[11] [Continued]

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

tices, adverse actions, and certain performance-based actions may be appealed either by means of the grievance procedures or by statutory appeals procedures. See 5 U.S.C. 7121(d) and (e)(1). "Grievances" are broadly defined: "[A]ny complaint" by "any employee" or "any labor organization" concerning "any matter relating to the employment of any employee," including the interpretation, effect, application, and breach of a collective bargaining agreement, or of a law, rule, or regulation affecting conditions of employment, is a "grievance."[12] The parties to the agreement "may exclude any matter from the application of the grievance procedures." 5 U.S.C. 7121(a)(2). Any negotiated grievance procedure must, *inter alia*, *both assure the union the right (1) to present and process grievances on its own behalf* or on the behalf of any unit employee, and (2) to be present during any grievance proceeding, and provide for *binding arbitration* of grievances at the invocation of either the agency or the *union*. See 5 U.S.C. 7121(b)(3), *supra*, 2.

Where the union and agency have determined through collective bargaining to include in the scope of grievance procedures matters covered under Chapters 23 (prohibited personnel practices, including statutorily proscribed discrimination), 43 (performance-based removals or reductions-in-grade), or 75 (adverse actions) of title

---

[12] "[G]rievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

5 U.S.C. 7103(a)(9).

5, U.S. Code, an aggrieved employee may raise these matters either through the negotiated grievance procedure or through statutory appeals procedures (Special Counsel, MSPB, or Equal Employment Opportunity), but not both. 5 U.S.C. 7121(d) and (e)(1).[13] If the negotiated procedure is utilized in such matters and arbitration is invoked by the union, as in the instant case, section 7121(e)(2) states that "an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable." (Pet. Br. 2).

In the context of the instant dispute, Title VII evinces two significant departures from the scheme governing labor-management relations under Executive Order 11491:

(1) "binding arbitration" is *required* by 5 U.S.C. 7121(b)(3)(C), whereas under the regime of the Executive Order program the parties determined by collective bargaining whether to submit grievances to arbitration; and

(2) "grievance" is broadly defined by 5 U.S.C. 7103(a)(9) to include adverse actions, whereas the Executive Order did not permit the grieving of adverse actions.

---

[13] 5 U.S.C. 7121(e)(1) states in pertinent part:

Matters covered under sections 4303 [performance-based reductions in grade and removals] and 7512 [adverse actions] of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title [before the MSPB and Equal Employment Opportunity Commission] or under the negotiated grievance procedure, but not both. . . . An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

As outlined above, the requirements of Titles II and VII clearly compliment each other in purpose and effect. Title II's provisions assure, *inter alia*, that federal employees utilizing a statutory appeals process "receive appropriate protection through increasing the authority and powers of the Merit Systems Protection Board in processing hearings and appeals affecting Federal employees" (see p. 14, n.9, *supra*). Title VII's provisions, similarly, which generally "significantly strengthened the position of public employee unions" (*BATF*, *supra*, 104 S.Ct. at 441) and are "intended . . . to make the collective bargaining process a more effective instrument of the public interest than it had been under the Executive Order regime[]" (*id.* at 449), enable employees utilizing a negotiated grievance procedure to receive the bargained-for protections of the collective bargaining agreement. Bargained-for procedures are usually considerably greater than Title II's protections.[14]

2. An analysis of the contested award, especially in the light of the expedited nature of the proceeding, establishes that the award is fully deserving of affirmance by this Court.[15] The following findings of the arbitrator,

---

[14] Nothing in the CSRA limits the extent that the *procedures* by which management exercises its reserved authority may be negotiated. See 5 U.S.C. 7106(b). Only the union, however, as the representative of all bargaining unit employees, may invoke the arbitration procedure under 5 U.S.C. 7121(b)(3)(C) on behalf of an aggrieved employee to protect the integrity of these negotiated procedures.

[15] This expedited procedure, providing its result is binding on the parties, fully realizes the positive effect of arbitration on Government efficiency, as recognized by Congress implicitly in the Act's mandate of arbitration and expressly during the House debate. *See, e.g.*, remarks of Rep. Ford, a co-sponsor of H.R. 21180, 124 Cong. Rec. 8468 (1978) quoted *infra*, 29 n.23. The appealed-from arbitrator's award arose from an expedited arbitration proce-

based on the parties' submission to him, frame the case before the Court:

(1) the agency established a *prima facie* case against the employees which the union failed to refute as a consequence of its position—not accepted by the arbitrator—that it was unnecessary to address the merits of the charges because the agency's procedural errors fatally infected the charges (Pet. App. 31a);

(2) the employees' affidavits—the "only" evidence relied upon by the arbitrator (*id.* at 31a-32a)—being "mutually corroborative" and constituting "admissions by the Grievants against their own interests," sufficiently "substantiated" the charges (*id.* at 32a);

(3) the agency violated Article XXVII, Section 2, of the contract by failing to give the two employees an opportunity to have a union representative present either during the investigation or when the affidavits were secured in which the misconduct was admitted (*id.* at 34a);

(4) the agency took an unreasonable period of time to initiate the adverse actions after discovery of the charged misconduct, thereby violating both Article XXVII, Section 3, of Supplement #1 to the contract and its own administrative guidelines for disposition of grievances (*id.* at 38a);

(5) the agency's untimely actions lent "credence to the Union's complaints during the hearing that the Agency's failure to promptly supply requested information interfered with its preparations for the hearing and resulted in the filing of additional unfair labor practice charges" (*id.*); and

---

dure under which the parties mutually eschewed the benefits of a transcript and post-hearing brief in the interest of a speedy award and reduced costs for both parties (Pet. App. 21a).

(6) there was a "pervasive failure" to comply with the due process requirements of the agreement (*id.*).

The issue, *as formulated by the parties and presented to the arbitrator*, was: "*Was the removal* of Grievants from government service *for just cause*? If not, *what is the remedy*?" *Id.* at 21a [emphasis supplied].

In addressing the above-stated issue, arbitrator Nutt deftly articulated the concerns manifest in the scheme and language of the Act (set forth, *supra*, 13-20) that the rights of employees—individually and collectively, as set forth in statute and collective bargaining agreements, respectively—be protected while the effectiveness and "efficiency" of the Government are maintained.[16] Arbitrator Nutt's award states, in this regard, that the effect of the agency's procedural errors "depends upon consideration of all the facts" (Pet. App. 34a). Because the grievants, as police officers, were considered to be "familiar with the ordinary technicalities of the law" insofar as their executions of the affidavits were concerned, the agency's failure to afford the grievants the required representation "may not have been prejudicial" to *them* (*id.* at 35a). Under this circumstance, an "emphasis upon technicalities would be inconsistent with the informal atmosphere of the arbitration process and the end result could be quite ludicrous," the award states (*id.*). Citing grievant Wilson as an example, the arbitrator posited that Wilson's demonstrated untrustworthiness required his removal from a position "with access to the tape recorder" (*id.*) in order to preserve the "security" and efficiency of the service. The overturning of Wilson's discipline "on the sole ground that his removal was in violation of a contractual requirement, would be to elevate form above substance" (*id.* at 36a). Arbitrator Nutt declined to do this, expressly recognizing that agency effectiveness and efficiency would be compromised by such a drastic sanction.

[16] See 5 U.S.C. 7101(b) ("The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.") and 5 U.S.C. 7513(d) (Adverse actions may be taken "only for such cause as will promote the efficiency of the service.").

Similarly, while agreeing with the union that the agency had failed to abide by the time limits of the contract and of its own regulations, and although characterizing the agency's timing as "inordinate delay," the arbitrator declined to penalize the agency "for such procedural violations in the absence of some adverse effect upon the grievants" (*id.* at 37a-38a).[17] Thus, the arbitrator *refused to overturn* the disciplinary actions and thereby to endorse an "emphasis upon technicalities" (*id.* at 35a) or "to elevate form above substance" (*id.* at 36a) with respect to the violations of the due process representation rights. He *refused*, moreover, *to overturn* the disciplinary actions and to penalize the agency thereby for untimeliness in the absence of prejudice to the grievants. Clearly, his decision in this respect fully comports with the Act's intent.

On the other hand, the arbitrator recognized the importance of maintaining the integrity of the bargained-for procedural requirements which the agency had ignored (*id.*). While one approach to the enforcement of the contract's procedural requirements might be to void the disciplinary action when such requirements are flouted—an approach which the arbitrator rejected—the "better approach recognizes . . . that any failure to comply will be penalized, but will not thereby render the action void" (*id.*).[18] Such an approach "will most likely

[17] The agency's failure to be timely, however, evinced that the union's preparation for the hearing had been interfered with, and additional unfair labor practice charges had been filed, as a consequence of the agency's delinquency (*id.* at 38a).

[18] As an example of a harsh penalty, arbitrator Nutt suggested that "[h]ad the Grievants made incriminating statements while *being denied* union representation in the investigatory interview,

assure the Agency's making certain that the contract is followed in the future" (*id.*).

In adopting the approach designed both to assure the integrity of collective bargaining and to protect the efficiency and effectiveness of the agency, arbitrator Nutt clearly *sustained* the disciplinary action *while modifying the penalty* to "provide protection to the Agency" (*id.* at 38a) in conformance with the facts of the misconduct.[19] Thus, in determining the "just cause" issue put before him by the parties, the arbitrator correctly looked to the *totality* of the circumstances attendant on the agency actions, including the provisions of the contract from which, after all, he derived his jurisdiction and by which "just cause" is determined. The award, in sum, is entirely consistent with the Act's balanced variety of purposes and provisions, effectuating the Congressional intent, discussed *supra*, 13-20, both (1) to strengthen the authority of federal managers to discipline employees *and* (2) to strengthen concomitantly the position of employee unions in the federal service, as well as statutory protections for employees. The award, moreover, is based squarely on the terms of the contract construed by Arbitrator Nutt and does *not* in substance or theory incorrectly interpret statutes or regulations in reaching its balanced remedy. It is, therefore, entitled to judicial acceptance as an award that "draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

---

the arbitrator might properly exclude such evidence." *Id.* [Emphasis in original.] In other words, had there been an affirmative *denial* of due process, as opposed to a failure to afford an opportunity for union representation, the arbitrator suggests that the only evidence he found conclusive—the grievants' affidavits—might have been excluded, with the effect of reversing the discipline.

[19] *E.g.*, both grievants were punished by the imposition of two weeks' suspensions without pay. Grievant Wilson was expressly precluded by the award from re-assuming a clerical position in which agency security might be compromised.

3. The language of the Act supports the arbitrator's application of the "harmful error" standard to encompass pervasive violations of the contract which are prejudicial to the union, as well as errors prejudicial to a particular grievant. It is not disputed that this standard is applicable to arbitrations, notwithstanding the absence of express statutory application.[20] Petitioner mistakenly contends (Pet. Br. 14-20) that an arbitrator *cannot* "take account of significant violations of the collective bargaining agreement, important to the union, even though the particular grievants may not have been themselves adversely affected" (Pet. App. 12a). Because the "harmful error" standard of 5 U.S.C. 7701(c)(2) requires for its operation in MSPB proceedings proof of actual prejudice—to an employee who is a party before the MSPB—resulting from error by the agency in the application of its procedures, petitioner erroneously reasons that only such harmful error—prejudicial to the

---

[20] The statutory standard of proof for adverse action cases, applicable to adverse action arbitrations by operation of 5 U.S.C. 7121(e)(2), states that the agency's decision shall be sustained "only if . . . supported by a preponderance of the evidence," 5 U.S.C. 7701(c)(1)(B) (1982). While the express language of 5 U.S.C. 7121(e)(2) makes only the standard of proof provision—5 U.S.C. 7701(c)(1)—applicable to arbitrations, the latter section is, by its own terms, "subject to" section 7701(c)(2), which states that "the agency's decision may not be sustained . . . if the employee or applicant for employment—(A) shows harmful error in the application of the agency's procedures. . . ; (B) shows that the decision was based on any prohibited personnel practices. . . ; or (C) shows that the decision was not in accordance with law." Since it is consistent with Congress' express purpose in the Act to strengthen the protection of employees from prohibited personnel practices and other unlawful agency actions to apply section 7701(c)(2) to Title VII arbitration, and since without such application inconsistency in adjudicatory burdens of proof and forum shopping would be promoted, an arbitrator appropriately applies this section. *Cf.* Pet. App. 11a; *White, supra*, 697 F.2d at 441; and *Devine v. Brisco*, 733 F.2d 867, 872 (Fed. Cir. 1984). And see H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 157, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2891.

grieving employee—may be taken into account by an arbitrator in *mitigating* a penalty.

The *White* court of appeals and the court of appeals in this case, however, found persuasive indications in the CSRA's language and statutory scheme that "important union rights are also to be enforced in the negotiated grievance procedure." Pet. App. 13a, and *White*, *supra*, 697 F.2d at 443; *see id.* at 446 (Bork, J., concurring). The courts of appeals' parallel conclusions, and the award at bar, are clearly supported by the language and scheme of the Act, as well as by the Congressional intent as manifested in the express overall findings of Congress set forth at 5 U.S.C. 7101(a).

In this regard the plain language of the Act *neither states nor suggests* that harmful error exists only, as petitioner contends, where there is prejudice to the individual grievant. The language states that an agency decision may not be sustained if there was "harmful error in the application of the agency's procedures in arriving at such a decision." 5 U.S.C. 7701(c)(2)(A). The MSPB has construed this language in MSPB proceedings to mean error with respect to an appellant's rights such that, in the absence of the error, the agency might have reached a different conclusion.[21] The MSPB, however, has never reached the issue of section 7701(c)(2)(A)'s relationship to procedural errors harmful to a union, *because unions are not proper parties to MSPB proceedings.* See 5 U.S.C. 7701(a). It is evident that the precise issue at bar has never been addressed by the MSPB. It is equally clear that the issue at hand arose under Title VII of the CSRA, which is a statute administered by the Federal Labor Relations Authority (FLRA). See 5 U.S.C. 7105(a). Only with respect to arbitrators' decisions in discrimination cases does the MSPB have any review authority. 5 U.S.C. 7121(d).

---

[21] 5 CFR 1201.56(c)(3) [quoted at Pet. Br. 15].

Thus, the "deference" urged by petitioner to the conclusions of the Board (Pet. Br. 14-16) is wholly inappropriate in the instant case, particularly where Congress intended other authorities, such as arbitrators or the FLRA, with specialized experience in the field of labor relations to use that expertise to give content to the principles and goals set forth in the Act's Title VII.

The legislative history is also unilluminating with respect to the question of the scope of the harmful error provision. Petitioner relies on legislative history attendant on an earlier version of the harmful error rule, contained in the original Senate bill (Pet. Br. 16 n.12). The Senate report accompanying the bill states that the harmful error provision in the Senate bill required substantial impairment of the rights of the individual employees (S. Rep. No. 95-969, 95th Cong., 2d Sess, 51, 54 64 (1978)). The comments in the Senate report, however, relate to language in the original Senate bill itself which contained the reference to prejudice to the rights "of the employee." *Id.* at 179, 224. Congress failed to enact the language referring to prejudice to the individual employee, but adopted instead—without comment in the legislative history—the present broad "harmful error" language. Thus, it is more reasonable to assume that the deletion of reference to individual rights was purposeful, rather than to assume in the light of the role of unions in the statutory scheme that the substantially changed language reflected the original Senate intent. The legislative intent of section 7701(c)(2)(A), therefore, offers no support to petitioner's misguided position that the harmful error provision is intended to be applicable only where there is prejudice to *individual* rights, as opposed to *union*, or *collective employees'* rights.

4. The scheme of Title VII, furthermore, as outlined, *supra*, 13-20, evinces both (1) that collective bargaining and arbitration were considered by Congress as essential elements—if not the most important components—of the

statutory mechanism by which the benefits of productive federal labor relations were to be realized, and (2) that in the arbitral context union rights, as well as a grievant's rights, are to be protected. In this regard, Congress' declaration that unions and collective bargaining serve the public interest (5 U.S.C. 7101(a), *supra*, 17), the Act's broad collective bargaining mandate (5 U.S.C. 7103(a)(12) and (14), 7116(a)(5) and (b)(5)), and the explicit negotiability of the procedures by which agency rights are exercised (5 U.S.C. 7106(b)), together demonstrate the strengthened role of unions and collective bargaining under the Act. See *BATF*, *supra*, 104 S.Ct. at 441, 449.

The broadening of the statutory definition of "grievance" to include adverse actions (5 U.S.C. 7103(a)(9), *supra*, 18 n.12), the requirement of contractual grievance procedures (5 U.S.C. 7121(a)(1)), and the new requirement of mandatory arbitration (5 U.S.C. 7121(b)(3)), furthermore, establish as an integral part of the Act's collective bargaining mandate Congress' express adoption of arbitration in the federal sector as an important means to promote effective and efficient management. This adoption implemented for the federal sector "the federal policy favoring arbitration of labor disputes" in the private sector enunciated by this Court in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) and the *Steelworkers* Triology.[22] Such policy reflects the longstanding recognition that: (1) "arbitration of [labor-management] disputes is faster, cheaper, less formal, more responsive to industrial needs, and more conducive to the preservation of ongoing employment relations than is litigation," *White*, *supra*, 697 F.2d at 435 [citation omitted]; (2) "arbitration is perceived to produce results that are qualitatively superior to the results achieved through litigation in comparable personnel and labor relations matters," *id.* [citations omitted]; and (3) "the overwhelming majority of union and management officials prefer arbitration over resort to the courts." *Id.* [Citations omitted.][23] Since "no one seriously doubts that in-court litigation time in comparable cases is much longer than the time required to arbitrate a dispute, and no evidence need be cited to make the point that full-blown litigation, including discovery and appeals, is significantly more expensive than arbitration," *White*, *supra*, 697 F.2d at 435 [citations omitted], it is beyond dispute that the Act envisions arbitration as fundamental to the process of making collective bargaining a more effective instrument of public policy and essential to effective and efficient government.

[22] *United Steelworkers v. Enterprise Wheel and Car Corp.*, *supra*; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

It is equally clear from the scheme of the Act, as discussed *supra*, 13-20, that the union and the agency are the major parties to any arbitration. These parties have negotiated the grievance procedures and terms of the collective bargaining agreement controlling the arbitration and determined the applicability of such procedures to any matter. The union and agency jointly possess the ex-

[23] See remarks of Representative Ford, co-sponsor of the CSRA, during the House debate, 124 Cong. Rec. 8468 (August 11, 1978) ("Binding arbitration . . . has worked well as an expeditious, credible, and cost effective means of dispute resolution. . . . From the management's point of view, arbitration provides a business-like approach to grievance and appeals handling. The union, which must decide whether to arbitrate, can serve as an effective screening device in frivolous, costly grievances. Further, the arbitration process is more efficient, less time consuming, and less formal than the statutory appeal system. Fizally, the costs of arbitration (which tend to average about $840.00 per case, excluding attorney fees) are generally—though not always—shared equally by the union and agencies, rather than by the taxpayer who bears the burden under the statutory appeals process. The more issues we can arbitrate, rather than going through the statutory appeals process, the more money we can save the public.")

clusive power to invoke the arbitral proceedings, and these parties jointly select an acceptable arbitrator.

The procedural safeguards negotiated by the union, therefore, are bargained-for union rights. The agreement's due process entitlements are the collective rights of all individual unit employees, who comprise the union. In the arbitral context, accordingly, the union is the proper party to enforce the collective rights of its members. When the arbitration involves an individual's grievance, in order to protect the collective interests of the union's membership and to ensure future compliance with the terms of the collective bargaining agreement, it is entirely reasonable and consistent with the Act for an arbitrator to consider violations of the union's rights which may not be prejudicial to the individual grievant.

B. The Court Below Correctly Apprehended The Act To Authorize Arbitrators To Take Account Of Significant Violations Of The Collective Bargaining Agreement, Important To The Union, Even Though The Particular Grievants May Not Themselves Have Been Directly Prejudiced.

1. The two courts of appeals which have analyzed the CSRA to determine the issue presented here have reached essentially identical conclusions. As explained by the court below, the role of unions and collective bargaining agreements in the statutory scheme is one, respectively, of a major (if not the major) party to the arbitration whose proper interests in the form of negotiated agreements are to be protected (Pet. App. 12a). The CSRA expressly provides, as already noted, that management prerogatives shall not "preclude any agency and any labor organization from negotiating . . . *procedures* which management officials of the agency will observe in exercising [their] authority" to discipline employees. 5 U.S.C. 7106(b) [emphasis added]. AFGE and GSA agreed in the instant contract to institute procedures

that provide employees with union representation at investigatory interviews and timely notice of proposed adverse action within a reasonable period after the offense or GSA's discovery of an offense. Such procedural safeguards, established by agreement, effectively became bargained-for union rights (Pet. App. 12a). Violations of such rights damage the collective bargaining process and thereby undermine the "unquestionabl[e] inten[tion]" of Congress in the Act "to strengthen the position of federal unions and to make the collective bargaining process a more effective instrument of the public interest than it had been under the Executive Order regime." *BATF*, *supra*, 104 S.Ct. at 449. And see 5 U.S.C. 7101(a) ("The Congress finds that * * * labor organizations and collective bargaining in the civil service are in the public interest.") Since the Act requires expressly that its provisions be interpreted to promote effective and efficient government, it is evident that the CSRA's scheme envisions, as the court of appeals correctly held, "that important *union* rights are also to be enforced in the negotiated grievance procedure" (Pet. App. 13a [emphasis in original]).

2. Petitioner's contrary contention fails completely to give any effect to the parties' assessment of the substantiality of bargained-for procedural rights, for if "harmful error" must always be shown in the sense that an employee's own case is prejudiced, "then the procedures arrived at through collective bargaining become meaningless." *White*, *supra*, 697 F.2d at 446 (Bork, J., concurring). In the federal sector, in particular, where unions are limited to bargaining over procedural matters that do not prevent an agency from exercising its reserved management rights (*see Dept. of Defense, AAFES v. FLRA*, 659 F.2d 1140, 1150-58 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982)), enforcement of bargained-for rights is crucial to fulfilling the CSRA's objectives, as outlined above. Within the areas in which bargaining

is permissible, government managers are surely believed by Congress to be competent to look out for the government's interests. *See id.*, at 1157. "Eroding the safeguards that these managers concede to employees' representatives in the collective bargaining process by apply. the MSPB's monolithic 'harmful error' standard wo thus be inconsistent with Congress' desire to ensure th the federal government, as well as the private sector, received the benefits that flow from collective bargaining." *White, supra*, 697 F.2d at 443 [citations omitted]. And *see* 5 U.S.C. 7101(a).

3. Petitioner's further concern that, simply by virtue of the inclusion of a procedural right in a collective bargaining agreement, its violation would provide the basis for the setting aside or mitigation of agency adverse actions (Pet. 13) is also unjustified. Petitioner erroneously characterizes the court of appeals' holding as a "per se approach" (*id.*). Nothing in the petitioned-from decision, however, supports that characterization. In fact, the union argued to the arbitrator in the case at hand that the agency's failure to comply with the agreement's procedural provisions "interfered with the union's preparation for hearings and resulted in the filing of additional unfair labor practices" (Pet. App. 38a). Clearly *there was a showing of prejudice to AFGE*, recognized by the arbitrator (*id.*).

In a later case the same court of appeals, furthermore, overturned an arbitrator's award where there was no indication in the record that the union presented any evidence to the arbitrator that it was harmed by the agency's delay in giving notice to the employee. *See Devine v. Brisco, supra*, 733 F.2d at 873, Op. App. 11a. In the absence of a showing of harm to the union, the *Brisco* court would not assume the existence of error harmful to the union, noting that "a mere conjectural possibility of prejudice cannot suffice as a basis for inferring actual prejudice." *Id.* citing *White, supra*, 697 F.2d at 442. In the face of *Brisco*, petitioner's concern

that a "per se" rule is promulgated in the petitioned-from decision is totally lacking in foundation.

C. The Appealed-From Decision Does Not Occasion Impermissible Differences In Appeal Rights Under Title II And Title VII.

A further objection of petitioner is that the court of appeals' decision frustrates the congressional intent "to promote consistency in the resolution of [burden of proof and standard of proof] issues, and to avoid forum shopping" (Pet. Br. 20, quoting H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 157 (1978)). Petitioner erroneously contends that "the decision below virtually guarantees that forum shopping will occur" (*id.*). According to petitioner, the result of the decision at bar will be that different standards will be applied to employees' appeals according to whether or not the employees utilize an agreement's grievance and arbitration procedures or choose to appeal to the MSPB. Pet. Br. 21. Petitioner asserts, in short, not only that arbitrators are bound to follow the statutory standards of proof so as to avoid such differing standards from one forum to another but also, erroneously, that *any* difference in the two types of proceedings should not be tolerated.

Neither respondents herein, nor the courts of appeals, disagree with petitioner insofar as application of the "harmful error" rule to situations where *employees* are prejudiced is concerned. *See White, supra*, 697 F.2d at 441; Pet. App. 11a; *Brisco, supra*, 733 F.2d at 872, Op. App. 11a-12a. The *White* court and the court below disagree with petitioner, however, with respect to the *scope* of the rule in recognition of the role of unions in the collective bargaining and grievance process. While petitioner urges that the MSPB's interpretation of the rule is the only correct one—requiring prejudice *to the employee*—the courts of appeals have disagreed, as previously discussed, *supra*, 26, 30-32, holding that "the

harmful error rule is not limited in applicability to situations where employees are prejudiced, but extends to instances where a union [as in the case at hand] can show violations of contractual provisions tantamount to harmful error to itself." *Brisco, supra*, 733 F.2d at 872, Op. App. 11a-12a, citing Pet. App. 11a; *White, supra*, 697 F.2d at 443.

Petitioner argues that it is unfair to allow employees in collective bargaining units to benefit from arbitral procedures and standards that are not available to other non-unit employees (Pet. Br. 21-22), and that only uniformity between arbitral and MSPB proceedings furthers the intent of the CSRA to avoid forum shopping (*id.*). In taking this position petitioner asks this Court to ignore the nature of a collective bargaining agreement, which is both a contract between the parties and "a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers v. Warrior and Gulf Navigation Co., supra*, 363 U.S. at 578.

A collective bargaining agreement, as the courts have repeatedly recognized, may provide for many procedures advantageous to bargaining unit employees which are not available to non-unit employees, such as the staying, as in the instant case, of a disciplinary action or personnel action until after a grievance contesting the action has been adjudicated by an arbitrator, to name only one such procedure. *See Dept. of Defense, supra* (procedure is negotiable which stays adverse action pending arbitral decisions), and *Veterans Administration v. FLRA*, 675 F.2d 260 (11th Cir. 1982) (procedure is negotiable which stays personnel actions pending arbitral decision). Under 5 U.S.C. 7121(a)(2), moreover, a union and an agency could limit an arbitrator's authority by agreement in a manner which renders the arbitral process quite different from the MSPB process. On the other hand, an employee aggrieved by a prohibited personnel practice

could benefit in the statutory appeals process by the intervention of the Special Counsel before the MSPB on behalf of the employee (see 5 U.S.C. 1206(i)), while the same employee, electing to proceed under the negotiated grievance procedure, receives no such benefit. Moreover, an employee electing the grievance procedure has no guarantee of an arbitration hearing, since it is within the union's discretion *not* to invoke arbitration. See 5 U.S.C. 7121(b)(3)(C). The courts of appeals, in recognition of the differing natures of negotiated and statutorily prescribed appeal procedures, have repeatedly held that "nothing in the CSRA requires that arbitration and MSPB actions always adhere to the same standards and procedures, or produce the same results in like cases." *Sutermeister, supra*, 724 F.2d at 1565, quoting with approval *Local 2578, AFGE v. GSA*, 711 F.2d 261, 264 (D.C. Cir. 1983). As in the instant case, courts of appeals acknowledge that "adverse action arbitrations 'are statutorily required to be similar to MSPB hearings in some respects but in other respects may be different.'" Pet. App. 13a, quoting *Otherson v. INS*, 711 F.2d 267, 273 (D.C. Cir. 1983). It is the differences, in fact, between negotiated rights and statutory rights, which lend sustenance to federal sector bargaining. Accordingly, petitioner's position gives too little scope and effect to negotiated rights essential to the collective bargaining scheme which is central to the Act.

D. Congress Intended Federal Sector Arbitration To Reflect The Important Characteristics Of Arbitration In Private Sector Labor Relations.

1. The provisions of the Act establish that Congress was aware of, and intended to parallel in substantial degree in the Act, private sector labor relations experience and policy. See *e.g.*, 5 U.S.C. 7101(a)(1). A clear indication of this intent with respect to arbitral awards in particular is manifest in 5 U.S.C. 7122(a), which

authorizes the FLRA to reverse or modify arbitral awards because of deficiency, *inter alia*, "on grounds similar to those applied by Federal courts in private sector labor-management relations."

In the private sector the courts have uniformly refused to substitute their judgment for an arbitrator's determination to mitigate a penalty based on an interpretation of a "just" or "proper" cause contractual provision in the light of all relevant circumstances. See *e.g.*, *Alhambra Foundry Co., Ltd. v. General Warehousemen's Union, Local 598*, 687 F.2d 287 (9th Cir. 1982) (affirming arbitrator's reinstatement of discharged employees and imposition of disciplinary 30 day suspensions without pay, because the grievants were discharged for fighting in violation of the agreement); *Vulcan-Hart Corporation v. Stove, Furnace, & Allied Appliance Workers International Union Local No. 110*, 671 F.2d 1182 (8th Cir. 1982) (affirming arbitrator's construction of "sufficient cause" to require mitigation of discharge to a 30 day suspension without pay because of arbitratory, capricious, and discriminatory conduct of employer based in part on anti-union animus); *Industrial Mutual Association, Inc. v. Amalgamated Workers, Local Union No. 383*, 725 F.2d 406 (6th Cir. 1984) (enforcing arbitrator's reinstatement of discharged employees based upon construction of "proper cause" provision of contract and consideration of circumstances surrounding the discharge); and *International Brotherhood of Electrical Workers, Local Union No. 53 v. Sho-Me Power Corp.*, 715 F.2d 1322 (8th Cir. 1983) (affirming arbitrator's construction of "just cause" provision to mitigate discharge of employee to suspension without pay, notwithstanding finding the employee guilty of dishonesty, because employee had been discharged because of protected union activities). The courts have emphasized the traditional judicial reluctance to intrude on the arbitral process in the private sector, particularly where, as in this case, the award draws its essence from

the terms of the contract itself and *does not* interpret statutes or regulations in reaching its result. The reasons for such judicial caution are so well established that little elucidation is necessary. The "federal policy favoring arbitration of labor disputes," enunciated in *Textile Workers Union v. Lincoln Mills*, *supra*, and the *Steelworkers Trilogy*, *supra*, recognizes with respect to labor disputes that arbitration is preferable to litigation by every measurable standard, for the very nature of arbitration tends to promote expeditious resolutions of disputes. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 240 (1970). It is for this reason that arbitration is so widely favored in both public and private sector labor relations. F. Elkouri & E. Elkouri, *How Arbitration Works*, 7, 10-12 (3d ed. 1973). See *Devine v. White*, *supra*, 697 F.2d notes 66-71, at 435.

The advantages of arbitration over litigation in personnel cases—such as speed of resolution, economy, informality, responsiveness to the parties' needs, and conduciveness to the sustenance of on-going employment relations—however, are effectively negated to the degree the extensive judicial scrutiny sought by petitioner encroaches on the arbitral process, for

> [i]n order to facilitate national labor goals, the arbitration results must be final and binding. Disputes should be conclusively resolved privately. Protracted litigation acts as an irritant in the . . . relationship and runs counter to the parties' own voluntary commitment to have an arbitrator, and not a court, decide the substance of the dispute. Plenary review of merit determinations would destroy finality.

Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231, 260 (footnote omitted) (1977); *see* Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 427-29 & n. 3 (1969). The impact of such a loss

of finality on the speed and expense of arbitration[24] is especially clear in the instant case, where an *expedited arbitration procedure*—which was negotiated by the parties and elected by the grievants, and in which the parties mutually eschewed the advantages of a transcript and post-hearing briefs in return for the benefits of speed and economy—is totally vitiated by lengthy judicial review and its attendant costs.

2. The result of this Court's overturning the instant decision, moreover, will inevitably be a "shift [in federal sector arbitration] from the [private sector] arbitral model, in which decision makers are free to focus solely on the case before them rather than on the case as it might appear to an appellate court, to the administrative model, in which decision makers are often concerned primarily with building a record for review. . . ." *White*, *supra*, 697 F.2d at 436. The latter often produces "opinions parrot[ing] the appropriate statutory standards in conclusory terms, but suffer[ing] from a lack of reasoned analysis. Such a shift . . . would substantially undercut the ability of arbitrators successfully to resolve disputes arising out of the employment relationship," *id.* at 436, and thereby undermine in the federal sector "the amicable settlements of disputes between employees and their employers involving conditions of employment" which Congress expressly found contributing to the public interest, 5 U.S.C. 7101(a), and the "binding arbitration" to which Congress expressly mandated "any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject. . . ." 5 U.S.C. 7121 (b)(3)(C).

In view of the above, this Court should regard the arbitrator's award, as affirmed by the decision at bar,

---

[24] *See, e.g.*, Robins, *The Presidential Address: Threats to Arbitration*, in ARBITRATION ISSUES FOR THE 1980s, PROCEEDINGS OF THE 34TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1, 9 (J. Stern & B. Dennis eds. 1982).

as binding on the parties to the dispute, and its own role in reviewing the award as extremely limited, in accordance with this Court's unequivocal espousal of the common law tradition of deference to arbitral determinations in *United Steelworkers v. Enterprise Wheel & Car Corp.*, *supra*. Since the instant award is based solely on the terms of the contract between GSA and AFGE, and is consistent with law, it is entitled to judicial acceptance as an award that "draws its essence from the collective bargaining agreement." *Id.*, 363 U.S. at 597.

Accordingly, since petitioner points to no express statutory provision which conflicts with the court of appeals' extension of the "harmful error" rule to errors prejudicial to the union, and since the afore-cited repeated judicial recognition of the nature of arbitration is consistent with the overall intent of the CSRA to "strengthen the position of federal unions and to make the collective bargaining process a more effective instrument of the public interest," *BATF*, *supra*, 104 S.Ct. at 449, the court of appeals' decision is deserving of affirmance.

E. Effective And Efficient Government Is Effectuated Under The Act By Single Adjudications In Which Arbitrators May Resolve All Issues Affecting Union And Employee Parties Arising From Identical Facts.

Petitioner further contends that because the CSRA sets forth "alternative remedies by which union rights may be fully vindicated" (Pet. Br. 25-28), the court of appeals erred in permitting union rights to be enforced by means of the negotiated grievance/arbitration procedure. The statutory authorities by which unions may file grievances on their own behalf (5 U.S.C. 7121(b)(3)(A)) or file unfair labor practice charges against agencies (5 U.S.C. 7116 and 7118) are described by petitioner as the

exclusive remedies contemplated by the CSRA to protect union rights (Pet. Br. 25-28).

In so contending, petitioner conveniently ignores the CSRA's express prohibition of multiple appeals based on the same facts in different forums. 5 U.S.C. 7116(d), in this regard, provides:

> Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

The foregoing has been construed by the Federal Labor Relations Authority to require an irrevocable election of an appeal process by a *union* that has the effect of *precluding* the raising of an issue based on the same facts in another appeal process. *See Philadelphia Regional Office Operations, SSA and AFGE Local 3186*, 15 FLRA 211, 212 (July 2, 1984) ("[T]he union opted to file a grievance rather than an unfair labor practice charge [concerning the transfers of two employees]. In so doing the Union chose to rely upon alleged contract violations rather than provisions of the Statute. In accordance with section 7116(d), that choice now precludes the Union from alleging that the same conduct constitutes unfair labor practices."). Congress intended in 5 U.S.C. 7116(d), obviously, to prevent duplicative adjudicative proceedings based on the same matter which could result in inconsistent resolutions.

The FLRA has repeatedly interpreted this section, as well, to preclude the processing of any unfair labor practice charge when a grievance procedure or a statutory

appeals procedure has been initiated by *employees* with respect to the same matter. *See Internal Revenue Service and National Treasury Employees Union*, 3 FLRA 479 (June 26, 1980) ("[E]lection by grievants to raise the [contractual violation] in their timely grievances precludes the union raising the same issue under the unfair labor practice procedure [citations omitted]. . . .")

The FLRA, moreover, refuses to consider charges more appropriately resolved through arbitration. Thus, when AFGE filed unfair labor practice charges in the case at hand against GSA based upon GSA's pervasive violations of the collective bargaining agreement during the instant disciplinary proceedings, the FLRA refused to issue a complaint on the ground that the dispute "should . . . be resolved through the parties' negotiated grievance/arbitration procedures, rather than in the unfair labor practice forum." Dismissal letter from Marjorie K. Thompson, FLRA Acting Regional Director, Case No. 7-CA-20172, dated April 30, 1982 (Pet. Reply Br. App. 6a).

The legislative history of the afore-quoted section, furthermore, establishes Congressional intent to limit the options available to a union to remedy contract violations by an agency. In pertinent part the Senate Report states with respect to 5 U.S.C. 7116(d) [section 7216(d) in the Senate bill]:

> Subsection (d) is similar to a provision contained in section 19(d) of Executive Order 11491. Under section 19(d), issues which can be raised under a statutory appeal procedure may not be raised as an unfair labor practice. This prohibition is preserved in section 7216(d). However, section 7221(d) of this chapter permits a negotiated grievance procedure to cover matters for which a statutory appeal procedure exists, except for those matters specifically enumerated. Where a negotiated grievance procedure covers a nonexcepted matter for which a statutory appeal procedure exists (other than adverse action and discrimination matters), the otherwise applicable statu-

tory appeal procedure may not be invoked to resolve such matters. Accordingly, the issues involved may be raised either under the negotiated grievance procedure or, where appropriate, in an unfair labor practice proceeding. Those matters specifically enumerated in section 7221(d), which cannot be covered in a negotiated grievance procedure, must be resolved exclusively under the applicable statutory appeal procedure. Accordingly, issues which can be raised under such statutory appeal procedure may not be raised in an unfair labor practice proceeding. Finally, where discrimination or adverse action matters (including demotion or removal for unacceptable performance under section 4303 of this title) are covered by a negotiated grievance procedure, an employee has the option of using either the negotiated procedure or statutory procedures. The use of either option will preclude the use of the unfair labor practice procedure.

S.Rep. No. 95-969, 95th Cong., 2d Sess. 107 (1978).

As 5 U.S.C. 7116(d) and the afore-quoted legislative history demonstrate, accordingly, Congress clearly intended to avoid in the Act repetitious litigation in different forums based on the same factual situation. Petitioner's contrary proposition—that the union should file separate grievances, invoke separate arbitration, and file separate unfair labor practice charges in order to enforce its own rights, notwithstanding an identity of facts with the employees' appeals (Pet. Br. 25-28)—would result in duplicative administrative proceedings, substantial unnecessary costs to both agencies and unions, great waste of the time and energy of federal employee participants, and additional judicial appeals from the multiple administrative adjudications to an already over-burdened appellate judiciary. It is clear that petitioner's interpretation of the CSRA, consequently, is inconsistent with the express mandate of 5 U.S.C. 7101(b): "[T]he provisions of this chapter should be interpreted in a manner consistent with the requirement

of an effective and efficient Government." The court of appeals' decision, on the other hand, furthers government effectiveness and efficiency by permitting an arbitrator in one adjudication to preserve the vitality and integrity of provisions of collective bargaining agreements important to the parties in the collective bargaining process.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

CHARLES A. HOBBIE *
Staff Counsel

MARK D. ROTH
General Counsel
American Federation of
Government Employees, AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005
(202) 737-8700

* Counsel of Record

REPLY

BRIEF

Office - Supreme Court, U.S.
FILED
DEC 28 1984
ALEXANDER L. STEVAS,
CLERK

(1)

No. 83-1673

In the Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

ALLISON E. NUTT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases:	Page
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36	7
Barrentine v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728	7
Bureau of Alcohol, Tobacco & Firearms v. *Federal Labor Relations Authority*, No. 82-799 (Nov. 29, 1983)	1, 6
Carter v. *Kurzejeski*, 706 F.2d 835	9
Department of Air Force, 14 F.L.R.A. 390	9
Devine v. *Brisco*, 733 F.2d 867	3, 8
Devine v. *Pastore*, 732 F.2d 213	5
Devine v. *White*, 697 F.2d 421	3, 4
Internal Revenue Service:	
3 F.L.R.A. 479	10
9 F.L.R.A. 480	9
McDonough Power Equipment, Inc. v. *Greenwood*, No. 82-958 (Jan. 18, 1984)	3
Social Security Administration, 15 F.L.R.A. 211	9
Stalkfleet v. *United States Postal Service*, 6 M.S.P.B. 536	5
Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593	7
Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574	7
United States v. *Hasting*, No. 81-1463 (May 23, 1983)	3
United States Air Force, 4 F.L.R.A. 512	9
W.R. Grace & Co. v. *Local Union 759, Int'l Union of Rubber Workers*, No. 81-1314 (May 31, 1983)	7
Statutes and regulations:	
Civil Service Reform Act of 1978, 5 U.S.C. 2301 *et seq.*	1
5 U.S.C. 7101	1
5 U.S.C. 7101(b)	6
5 U.S.C. 7101-7135	10
5 U.S.C. 7103(a)(9)(C)(i)	8
5 U.S.C. 7106(b)	8
5 U.S.C. 7116(d)	9

Statutes and regulation—Continued: Page

5 U.S.C. 7121(a) 5
5 U.S.C. 7121(b) 5
5 U.S.C. 7121(b)(3)(A) 8
5 U.S.C. 7121(b)(3)(C) 3
5 U.S.C. 7121(e) 10
5 U.S.C. 7121(e)(2) 3, 8
5 U.S.C. 7121(f) 3, 6, 10
5 U.S.C. 7122(a) 2, 6, 10
5 U.S.C. 7122(a)(1) 6
5 U.S.C. 7123(a) 2
5 U.S.C. 7513(a) 7
5 U.S.C. 7701 10
5 U.S.C. 7701(c) 3, 6
5 U.S.C. 7701(c)(2) 1, 3
5 U.S.C. 7701(c)(2)(A) 3
5 U.S.C. 7701(j) 10
5 U.S.C. 7703(a)(1) 3
28 U.S.C. 1295(a)(9) 3
5 C.F.R. 1201.56(c)(3) 10

Miscellaneous:

H.R. Rep. 95-1717, 95th Cong., 2d Sess. (1978) 2, 5, 10
S. Rep. 95-969, 95th Cong., 2d Sess. (1978) 2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1673

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

ALLISON E. NUTT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents devote most of their brief to an outline of the role created for public employee unions and arbitration by the Civil Service Reform Act of 1978 (CSRA or the Act), 5 U.S.C. 2301 *et seq.* They conclude that the significance of collective bargaining will be unduly restricted, and the discretion of arbitrators improperly narrowed, unless the harmful error rule set out in 5 U.S.C. 7701(c)(2) is read to permit arbitrators to set aside adverse agency action on account of nonprejudicial violations of collective bargaining agreements.

In reaching this conclusion, however, respondents disregard the specific statutory provisions that limit the role of unions and channel the discretion of arbitrators in adverse action challenges, as well as Congress's express intention both to "preserv[e] the ability of federal managers to maintain 'an effective and efficient Government'" (*Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, No. 82-799 (Nov. 29, 1983), slip op. 2, quoting 5 U.S.C. 7101) and to forestall forum shopping on the part of aggrieved employees between the Merit Systems Protection Board (MSPB) and negotiated grievance procedures. At the same time, re-

spondents both overstate and understate the importance of the harmful error rule. Interpreting the rule as it was written—to permit the assertion in adverse action proceedings only of those procedural errors that affected the agency's decision—plainly will not, as respondents assert, make the collective bargaining process meaningless. Conversely, failure to apply the rule necessarily will lead to retention on the federal payroll of employees who have engaged in serious misconduct.

1. Respondents correctly observe that the CSRA recognizes the importance of collective bargaining and arbitration to federal employees. Respondents also properly note that unions play a significant role in the arbitration process. Br. 27-33. In arguing that these general characteristics of the CSRA implicitly authorize an arbitrator to vindicate "union rights" (Br. 28) by according a windfall benefit to an individual aggrieved employee in an adverse action challenge, however, respondents entirely ignore the other central purposes of the CSRA: those of "giv[ing] agencies greater ability to remove or discipline expeditiously employees who engage in misconduct" (S. Rep. 95-969, 95th Cong., 2d Sess. 51 (1978)) while "avoid[ing] forum shopping" on the part of aggrieved employees between the MSPB and negotiated grievance procedures. H.R. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978). In particular, respondents disregard the statutorily-prescribed nature of an arbitral adverse action challenge.

a. As drawn by Congress, challenges to adverse action call into play a unique set of procedures in which the union has a carefully defined and sharply limited role. Thus, as we explained in our opening brief (at 22-23, 27), when adverse action is at issue the employee rather than the union may choose the forum (either the grievance procedure or an appeal to the MSPB) for the challenge, and only the employee may seek judicial review of the arbitrator's ruling.[1] Similarly, Congress has promulgated substantive burden and standard of proof rules that—as respondents acknowledge (Br. 25 & n.20)—must in all events "govern" both MSPB and arbitral decisions in adverse action cases, no matter what the nature of the grievance procedures that have been negotiated by the union. 5 U.S.C. 7121(e)(2), 7701(c). See *Devine* v. *Brisco*, 733 F.2d 867, 872 (Fed. Cir. 1984). The harmful error rule, which is one of these substantive rules of decision (see *ibid.*), requires the arbitrator in an adverse action case to base his decision on the employee's situation: although the union represents the employee (5 U.S.C. 7121(b)(3)(C)), the arbitrator may reverse adverse agency action on account of procedural error only when the "*employee* or *applicant* for employment" carries the burden of "show[ing] harmful error in the application of the agency's procedures *in arriving at [its] decision.*" 5 U.S.C. 7701(c)(2) and (A) (emphasis added).[2]

Whatever the role of the union's interests in other contexts, then, Congress plainly placed the focus of an adverse action challenge squarely on the protection of the aggrieved employee.[3] This focus advances the con-

[1] Furthermore, while a union's appeal in a nonadverse action case goes first to the Federal Labor Relations Authority and then to the regional courts of appeals (5 U.S.C. 7122(a), 7123(a)), in an adverse action challenge the employee's appeal goes directly to the Federal Circuit. 5 U.S.C. 7121(f), 7703(a)(1); 28 U.S.C. 1295(a)(9).

[2] Given the requirement that the employee identify harmful error that occurred while the agency was "arriving at [its] decision," it is difficult to credit respondents' bald assertion that the language of the statute *"neither states nor suggests"* that error is "harmful" only when it affects the outcome of the proceeding (Br. 26 (emphasis in original)). This is particularly true given the parallel meaning accorded the term "harmful error" in other contexts. See, *e.g.*, *McDonough Power Equipment, Inc.* v. *Greenwood*, No. 82-958 (Jan. 18, 1984), slip op. 5; *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6.

[3] Despite respondents' repeated assertions to the contrary (Br. 8, 26, 30, 33), *Devine* v. *White*, 697 F.2d 421 (D.C. Cir. 1983), is not in accord with the decision below on the question whether union rights may be asserted in adverse action proceedings. In *White*, the District of Columbia Circuit held that an arbitrator may set aside adverse agency action on account of nonprejudicial violations of a

gressional aim of "[s]treamlin[ing] the processes for dismissing and disciplining Federal employees" (S. Rep. 95-969, *supra*, at 2). In contrast, allowing a union to assert its interests as part of an employee's adverse action challenge not only distorts the statutory structure and departs from the statutory language; it also requires—as the decision in this case demonstrates—retention on the federal payroll of employees who have engaged in manifestly "unacceptable conduct." *Id.* at 9.[4]

b. In response to our observation that identical burden and standard of proof rules apply in arbitral and MSPB proceedings, respondents assert that we would find fault with "*any* difference in the two types of proceedings" (Br. 33 (emphasis in original)). See also Br. of Amici Curiae National Treasury Employees Union (NTEU) and National Federation of Federal Employees (NFFE) 19-20. This argument brazenly misstates our position: in giving employees a choice of forums, Congress undeniably contemplated differences between the two types of proceedings. This use of different procedural devices might, of course, occasionally lead to different results in otherwise similar cases.[5]

---

negotiated procedural guarantee because "some bargained-for procedural rights are, by definition, substantial rights of *an employee*" (697 F.2d at 443 (emphasis added)). In contrast, the court below reasoned that adverse action may be set aside in such circumstances because procedural error harms the *union* (Pet. App. 12a-14a). While the decision in *White* also is inconsistent with the statutory language and purposes, its reasoning provides no support for respondents.

[4] Respondents' argument that the arbitrator in this case "clearly *sustained* the disciplinary action *while modifying the penalty*" (Br. 24 (emphasis in original)) is not meaningful. However the arbitrator's award is characterized, its effect was to overturn adverse agency action because of nonprejudicial procedural error; if the arbitrator's decision is upheld, the grievants in this case will be retained as federal law enforcement officers even though they engaged in misconduct that fully warranted discharge.

[5] We note, however, despite the hints of amici NTEU and NFFE to the contrary (Br. 20-21), that the only differences between MSPB and negotiated grievance proceedings will be procedural: the Board, as well as a contractual grievance mechanism, will fully

Despite the leeway given unions to negotiate for advantageous grievance *procedures* (see 5 U.S.C. 7121(a) and (b)), however, it is equally undeniable that Congress intended "to promote consistency in the resolution of [adverse action challenges], and to avoid forum shopping" (H.R. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978)) by providing that arbitrators must be "governed" by the same *substantive* standards as is the MSPB. 5 U.S.C. 7121(e)(2). Although respondents acknowledge this congressional goal (Br. 25 n.20), they make no attempt to address either the inconsistent results or the inevitable forum shopping that will flow from the use of rules of decision that lead to "predictable difference[s] in substantive outcome" between MSPB and arbitral adverse action decisions. *Devine* v. *Pastore*, 732 F.2d 213, 216 (D.C. Cir. 1984). Such differences unquestionably will follow from the permission granted arbitrators by the court below to depart from the CSRA's standard of proof and burden of proof provisions.[6]

2. Despite the existence of these statutory limits on the role of unions and the discretion of arbitrators, respondents assert that Congress intended to make the arbitral process apply to federal employees in a way that is essentially identical to its operation in the private sector (Br. 35-36). Pointing to the private sector's "common law" tradition of deference to arbitral decisions, respondents then reason that the arbitrator's

---

enforce negotiated rights. See, *e.g.*, *Stalkfleet* v. *United States Postal Service*, 6 M.S.P.B. 536, 537, 539 (1981).

[6] Thus, while respondents correctly suggest that a bargained-for procedural rule might, in a given case, enhance or detract from a grievant's ability to challenge adverse agency action (Br. 34-35), that is not the situation at issue here. Instead, the arbitrator in this case improperly departed from the "rules governing burden of proof and standard of proof" (H.R. Rep. 95-1717, *supra*, at 157), a course that, if sanctioned by this Court, will lead to routine and predictable differences in outcome between MSPB and arbitral adverse action decisions. The decisions cited by respondents (Br. 35) do not cast doubt on this point; they did not involve arbitral attempts to disregard Board interpretations of the CSRA's substantive standard and burden of proof rules.

award in this case should not be disturbed because it "draws its essence from the terms of the contract itself and *does not* interpret statutes or regulations in reaching its result" (Br. 36-37 (emphasis in original)). Both of these contentions are incorrect.

Respondents base (Br. 35-36) their arguments for the strict use of a private sector model on 5 U.S.C. 7122(a), which, as they note, in some circumstances allows the Federal Labor Relations Authority (FLRA) to modify arbitral awards on " 'grounds similar to those applied by the Federal courts in private sector labor-management relations' " (Br. 36). But respondents' selective quotation from this provision is highly misleading. In fact, the FLRA does *not* apply private sector rules in adverse action cases, because the Authority *never* addresses adverse action issues; challenges to arbitral decisions in such cases go directly to the Federal Circuit, rather than to the Authority. 5 U.S.C. 7121(f), 7122(a). Furthermore, even in areas where the FLRA has jurisdiction, Section 7122(a)(1) itself acknowledges the unique constraints on federal arbitration by directing the Authority to modify arbitral awards that are "contrary to any law, rule, or regulation." This provision, in combination with the statutory limits on arbitrators and public employee unions that are noted above, plainly indicates that private sector rules must give way when necessary to "preserv[e] the ability of federal managers to maintain 'an effective and efficient Government.' " *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, No. 82-799 (Nov. 29, 1983), slip op. 2, quoting 5 U.S.C. 7101(b). As a result, courts plainly cannot defer to arbitral decisions that disregard the statutory restrictions on arbitral authority imposed by 5 U.S.C. 7701(c).

In any event, respondents' arguments about the applicability of private sector rules are beside the point: even in the private sector respondents' reliance on the tradition of deference to arbitral judgments would be misplaced, because the controversy in this case does not involve the terms of the collective bargaining agreement.

Cf. Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Thus, the Agency on appeal did not challenge the arbitrator's findings of fact or his interpretation of the disputed contractual provisions (see Pet. App. 8a). Instead, the Agency took issue only with the arbitrator's decision to ignore a controlling provision of external law—the harmful error rule.[7] Since "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land" (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974)), the arbitrator's interpretation of the rule is entitled to no special deference. See also *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960). To the contrary, it is well established that an arbitral award that violates external law is unenforceable in federal court. See *W. R. Grace & Co.* v. *Local Union 759, Int'l Union of Rubber Workers*, No. 81-1314 (May 31, 1983), slip op. 8-9.[8]

3. Respondents again overstate their case in arguing that negotiated procedures will be rendered meaningless if nonprejudicial violations of those procedures cannot be enforced in individual adverse action challenges (Br.

---

[7] The arbitrator's—and respondents' (Br. 22)—attempt to characterize the issue in this case as being whether the grievants were removed from government service for "just cause" (see Pet. App. 21a) does not insulate the arbitral decision from review. As a matter of law, federal employees may be subjected to adverse action "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). And, in every case, no matter what provisions are contained in the contract, the arbitrator's decision must be governed by the statutory harmful error rule. Indeed, respondents appear to acknowledge that the issue in this case involves not the *arbitrator's* interpretation of the contract but the *court of appeals'* "extension of the 'harmful error' rule to errors prejudicial to the union" (Br. 39).

[8] Despite respondents' lengthy analysis of the issue (Br. 37-39), nothing in this case requires the Court to address the appropriate scope of judicial review of arbitral judgments. Rather, the question here is whether the arbitrator correctly interpreted controlling law. Respondents do not deny that arbitral awards are reviewable to the extent that they do not conform to statutory requirements.

30-32). In fact, under any interpretation of the harmful error rule, unions will be free to bargain for procedures to govern agency action (5 U.S.C. 7106(b)). Agencies will be obligated to abide by the agreed-upon procedures. And any adverse action affected by violations of such procedures will be overturned. By definition, then, only the least "meaningful" of procedural violations—those found by an arbitrator or the MSPB to have had no effect on the challenged agency action—will not be redressable in an employee's adverse action challenge. Moreover, a union may redress even those violations by filing either a grievance of its own or an unfair labor practice charge. See Gov't Br. 25-26.[9]

Thus, respondents are simply incorrect in making the uncharacteristic argument that a union may not use remedies other than an individual adverse action proceeding to vindicate all of its institutional rights. Indeed, respondents nowhere deny that a union may file a grievance "in its own behalf" to challenge "the effect or interpretation, or a claim of breach, of a collective bargaining agreement." 5 U.S.C. 7121(b)(3)(A), 7103(a)(9)(C)(i). For their part, amici NTEU and NFFE apparently acknowledge that the arbitrator in such a proceeding might order the agency to "cease and desist" from engaging in further procedural violations (Br. 26).[10] And it is far from clear that following such a

[9] Respondents' parallel suggestion that enforcement of the harmful error rule somehow will erode contractual rights (Br. 32) therefore makes little sense. The Federal Circuit has acknowledged that the harmful error rule plays such a significant role in the statutory scheme that an agency and a union may not "exclude the harmful error rule from the [collective bargaining] agreement" (*Devine* v. *Brisco*, 733 F.2d 867, 872 (1984)); as a result, enforcing the rule hardly can detract from a contract's meaning.

[10] Amici note that "[s]uch relief does not correct the past actions of the agency" (Br. 26-27). If past violations were harmful, however, the affected employee would be able to obtain relief; if the violations were harmless, an award of relief would be inappropriate. Indeed, although amici attempt to minimize the effectiveness of a cease and desist order, such an order would be just as effective in

course would, as respondents suggest (Br. 42-43), inevitably lead to duplicative proceedings; a union might, for example, file an institutional grievance that parallels an individual complaint lodged by an employee, and seek to have the two consolidated by an arbitrator.

Respondents do attempt to demonstrate the unavailability of an unfair labor practice remedy when the aggrieved employee has lodged a complaint through the negotiated grievance procedure (Br. 40), but nothing in the statutory provision upon which they rely (5 U.S.C. 7116(d)) provides that an employee's decision to pursue a particular procedural avenue forecloses a union from charging an unfair labor practice. To the contrary, Section 7116(d) states only that identical issues cannot be raised by the same "aggrieved party" both under the grievance procedure and as an unfair labor practice charge. This statutory language plainly does not prevent distinct aggrieved parties from basing separate causes of action on one factual situation. Thus, the FLRA has held that an employee's election does not bar the union from filing an unfair labor practice charge in its institutional capacity. See *Department of Air Force*, 14 F.L.R.A. 390, 391-392 (1984); *Internal Revenue Service*, 9 F.L.R.A. 480, 480-481 n.2, 492-493 (1982); *United States Air Force*, 4 F.L.R.A. 512, 527 (1980). See also *Carter* v. *Kurzejeski*, 706 F.2d 835, 843 n.10 (8th Cir. 1983). Respondents' lack of familiarity with this principle is surprising, for in this case they in fact filed both a grievance on the employees' behalf and an unfair labor practice charge; the Authority assumed jurisdiction and issued a complaint concerning one aspect of the charge (Pet. Reply Mem. App. 6a). See Gov't Br. 26-27 n.25.

The cases cited by respondents (Br. 40-41) are entirely consistent with the position outlined above. *Social Security Administration*, 15 F.L.R.A. 211, 212 (1984), held only that one aggrieved party—there, a union—

putting the agency on notice that its actions were improper as would an award such as the one in this case; the only difference between the two is that in the latter case the individual grievant will receive a windfall.

may not assert the *same* institutional and employee rights first in a grievance proceeding and then as an unfair labor practice charge. Similarly, in *Internal Revenue Service*, 3 F.L.R.A. 479 (1980), the Authority held that an employee's grievance barred a union's unfair labor practice charge because in both proceedings the union had requested information on behalf of the employee for use in his disciplinary action.

4. Finally, respondents disregard the statutory structure when they assert that deference is not due the MSPB's interpretation of the harmful error rule (Br. 26-27). Congress specifically has provided (5 U.S.C. 7701(j)) that the Board "may prescribe regulations to carry out the purpose of [5 U.S.C. 7701]," the provision in which the harmful error rule appears. The Board accordingly has promulgated a regulation defining the meaning of the term "harmful error." 5 C.F.R. 1201.56(c)(3). Such an interpretation of a statutory provision that Congress has placed within the Board's area of expertise must be accorded substantial deference. And, given the congressional insistence that "arbitrator[s] * * * follow the same rules governing burden of proof and standard of proof that govern adverse actions before the Board" (H.R. Rep. 95-1717, *supra*, at 157), that deference is as appropriate in a case on appeal from an arbitral judgment as it is in a case involving the review of a Board decision.

Respondents' parallel suggestion (Br. 26-27) that deference is due the FLRA rather than the MSPB pays equally little attention to the statutory language. Congress directed the Authority to carry out the purposes of 5 U.S.C. 7101-7135; the harmful error rule, however, appears in 5 U.S.C. 7701. Indeed, the FLRA never will have occasion even to address the meaning of the rule. The rule is applicable only in arbitral proceedings involving adverse action challenges (5 U.S.C. 7121(e)). Yet appeals of arbitral adverse action decisions bypass the FLRA altogether, going directly to the Federal Circuit. Compare 5 U.S.C. 7121(f) with 5 U.S.C. 7122(a). In

these circumstances, attempts to ascertain the FLRA's views on harmful error are unlikely to be of much assistance to the courts.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10129